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THE MODERN LEGAL PHILOSOPHY
SERIES

The Theory of Justice

THE MODERN LEGAL PHILOSOPHY SERIES

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Modern Legal Philosophy Series

THE THEORY OF JUSTICE

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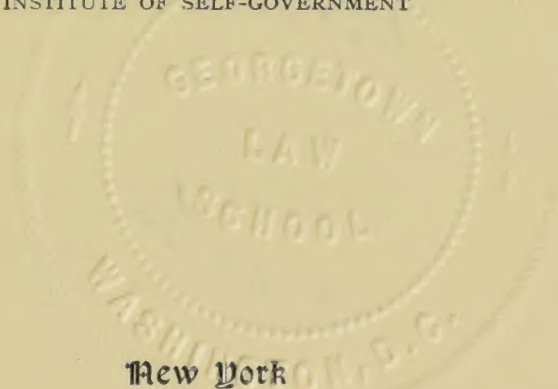
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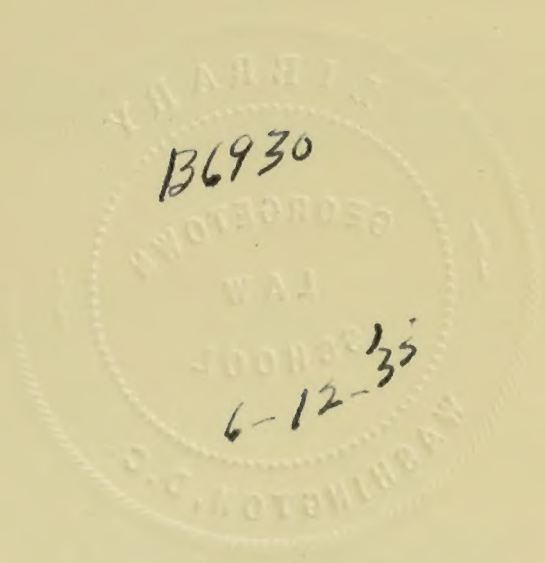
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GENERAL INTRODUCTION TO THE SERIES

BY THE EDITORIAL COMMITTEE

“Until either philosophers become kings,” said Socrates, “or kings philosophers, States will never succeed in remedying their shortcomings.” And if he was loath to give forth this view, because, as he admitted, it might “sink him beneath the waters of laughter and ridicule,” so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that “in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States.” But, he adds, “the Americans are much more addicted to the use of general ideas than

the English, and entertain a much greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.¹ And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all

¹ M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910:—

The need of the Series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad—to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.

How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn v. Fairmont Coal Co.*) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting:—

That a committee of five be appointed by the president, to arrange for the translation and publication of a Series of Continental master-works on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present Series is the result of these labors.

In the selection of this Series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this Series in their latest and most representative form. It is believed that the complete Series represents in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to Anglo-American readers the views of the best modern representative writers in jurisprudence and philosophy of law. The Series shows a wide geographical representation; but the selection has not been centered on the notion of giving equal recognition to all countries. Primarily, the design has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought

has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The Series has been so arranged (in the list fronting the title page) as to indicate the order of perusal most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this Series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common

linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this Series measurably helps to improve and to refine our institutions for the administration of justice.

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TRANSLATOR'S INTRODUCTION

Philosophy of Law is an expression of indefinite meaning. To Austin it means an analysis of the more general concepts underlying the details of legal rule and principle. His method of treating the substance of law is like the method of the grammarian in his analysis of language. It is a method of classification according to certain categories suggested by the material under investigation and implied therein. The purpose of the analysis is the better understanding of the details, which are seen to form parts of a whole, the easier mastery of the manifold rules as flowing from a more comprehensive formula, and the ability to correct errors in specific cases by reference to the broad principles suggested by the subject as a whole. Thus, a rule of grammar that nouns form their plural by addition of "s" to the singular expresses in a few words what would otherwise have to be learned in each case separately. But to make such a rule possible it is necessary that the material of the language — the vocabulary — should be classified according to the categories of the parts of speech, and each part of speech be further analyzed in reference to its attributes of number, gender, case and so on. Analytical jurisprudence, the jurisprudence of Austin, Holland and the majority of English writers on the subject, applies the same method to the material of law, *i.e.* to the social and economic relations of men, and the purpose is the same. That trover is a possessory action is a formula comprehending any number of concrete situations. But in order to express such a formula a good deal of classification and analysis must have gone before. The relations in which persons stand to things

must have been analyzed, so that the categories of ownership and possession have a meaning. Similarly the concept of action and the various kinds of actions are the result of analysis, going back ultimately to the basic elements of law, namely, rights and duties and the consequences of their violation.

This brief description of the nature of analytical jurisprudence shows that its method is a posteriori. It is based entirely on the material presented in the positive law, which it proceeds to arrange and classify according to principles of classification suggested by the subject matter and the use to which it is to be put. The definition of law itself is based upon a comparison of the positive law, as it exists in statute and decision, with other departments of human thought and action to which the word law is applied, such as the laws of physical nature, the laws of ethics, morality, honor, etiquette, the laws of a game, etc.

Analytical jurisprudence never goes beyond the positive law. It is expository of the positive law, not critical or evaluative. It may enable one to correct an error in a specific legal rule, or in the decision of a specific case. The criticism would lie within the system of positive law. It would be to the effect that the rule or decision in question is inconsistent with some other more comprehensive rule or principle derived from the system as a whole. But there cannot be in analytical jurisprudence a criticism of the positive law as such, or of its basic principles. Analytical jurisprudence does not evaluate the fundamental principles of law. Positive law as a matter of fact recognizes rights and duties of various kinds and protects and enforces them in certain ways. It derives its authority from the sovereign power in the State, hence without a State there is no law. The business of the analytical jurist is to expound in a systematic and scientific way what it has actually pleased the sovereign to command his subjects or citizens. It is not his concern to discuss

the right or the wrong, the justice or the injustice thereof. For as a jurist he knows only of legal right and wrong, legal justice and injustice. Hence right and just, wrong and unjust, mean respectively the same as accord with the law and violation thereof. The law itself cannot be according to law or against the law, hence the law itself is neither just nor unjust, neither right nor wrong.

It follows therefore that the study of analytical jurisprudence is of value primarily to the student, the lawyer and the judge. To the legislator and the statesman it is of value secondarily only in so far as it may enable him to formulate his legislation in a precise manner. But it has nothing to teach him that is substantial. The ideal legislator — and if we look upon him as representing the voice of the people, the ideal voice of the people — wants more than the knowledge of formal accuracy in the formulation of a desired law. He wants enlightenment on the desirability and justifiability of the contemplated measure. Analytical jurisprudence is silent in this matter. And not merely the legislator, the judge too is not always in a position to decide a given case in accordance with a technical rule of law. He may have to make a choice between two rules of law equally applicable so far as the technical aspect is concerned. Or there may be no rule applicable to the specific point in issue. Or the law itself may bid the judge decide in accordance with reason and justice. Analytical jurisprudence does not deal with reason and justice, it deals solely with positive law. An obvious solution would be to relegate all questions of the justice of law to the sphere of ethics. But it matters not what name one gives to this department of thought, the group of questions suggested in their peculiar applicability to legal relations must be studied by the jurist and the legislator. And moreover, there is a peculiar group of problems pertaining to the science of ethics, namely, the perfection of the will and the formation of character,

whereas in law we are concerned with external regulation of the conduct of men in relation to one another.

Stammler is not concerned — as a philosopher of law — with analytical jurisprudence. He presupposes that. He defines the philosophy of law as the *theory of those propositions about law* which have universal validity.¹ The concept of universal validity is one that Stammler never ceases repeating. But no study of positive law, however extensive and thorough, is capable of yielding universally valid propositions. They must therefore be arrived at in another manner. They are propositions about law and not propositions of law. They must be universally valid, that is, they must apply to all possible law, past, present and future. They are in the first place propositions which are implied in all law and without which no law is logically possible. They are ways of thinking which are indispensable if we are to think of such a thing as law. The method of arriving at these propositions Stammler speaks of as a critical deliberation ('kritische Selbstbesinnung') on the content of our mind. This is not very clear. And it is not made clearer by Stammler's statement that such critical deliberation presupposes a knowledge of law (the more thorough the knowledge the better); that it is not an a priori process, and is not derived from a fancied mythical source. So much is clear that in Kantian fashion (Stammler is a Neo-Kantian) Stammler lays stress on consciousness, on our mode of thinking and conceiving.

Now if we analyze critically our mode of conceiving reality, we find that we have two such modes, no more and no less. We conceive of natural phenomena as a series of events united by the law of causality. The cause determines the effect which succeeds it in time. This is a universally valid mode of thinking, which determines every possible natural event, else it is not a natural event

¹ Zeitschrift für Rechtsphilosophie, I, 4.

and we can not deal with it as such. We also find another mode of conceiving certain other domains of reality, namely the relation of means and purpose. The purpose, which comes later in realization, determines the means to be chosen. Means is a cause that is subject to choice. Volition pertains to this second category and is defined not as a force but as a mode of arranging and unifying our mental content.

Law is a kind of volition. It is a mode of arranging human acts according to the relation of means and purpose. The legislator does not describe the natural following of certain acts upon others as the physical scientist does with respect to natural phenomena. He determines that certain acts shall take place as means to certain purposes. When the law says that breach of contract should be followed by damages, it chooses the sanction as a means to the purpose of preventing breach of contract or loss to the party injured.

If we analyze volition we find that there are various kinds. An individual may select a given means for a specific purpose. This is individual or isolated volition. The law is not of this sort. It is a volition which binds man to man. It uses the acts of one individual as means to further the purposes of the other, and vice versa. But not all binding volition is of the same kind. The individual whose acts may thus be made use of as means for the purposes of other individuals may retain his privilege of refusing to be so treated and step out of the System; or the System may be such that the individual has no choice except so far as the System chooses to grant it. Law clearly belongs to the second class. Social customs of a certain kind are examples of the first. They are governed by conventional rules. Finally, we can conceive of a mode of volition, binding and sovereign ('selbstherrlich'), but arbitrary. That is, the author of the volition changes it as his whim suggests, and one never

knows how long a given determination will last or if it will last at all. This is not law. Law must be inviolable ('unverletzbar') so long as it is law. Law may be repealed, but cannot be violated arbitrarily. These are the essential elements of law, and taken together form the concept ('Begriff') of law. They are universally valid modes of thinking, and without them law is logically impossible.

It is of interest to compare Stammler's definition of law with that of Holland. Holland defines law as "a general rule of external human action enforced by a sovereign political authority." The word "general" no doubt implies not merely that it is not directed to a single individual as such, but to a class, or an individual as a member of a class, but also that it does not give an order to do a specific thing on a given specific occasion, but a general order in reference to a type of action. The word also implies that the order is intended to last until it is properly repealed. Hence the word "general" implies Stammler's fourth element, "inviolable." If law is "a rule of action," it of course has to do with means and purpose and not with cause and effect. However, Holland does not make this distinction specific, whereas Stammler carefully and rigidly defines wherein volition differs from observation. According to Holland law must be "enforced by a sovereign political authority." This means that there can be no law without a State, and that the State precedes law. Here Stammler disagrees with Holland. There is nothing said about the State in Stammler's definition, and as a matter of fact Stammler is of the opinion that law comes before the State, that the State is a creature of law. The moment there is society, there is externally regulated conduct — this is what society means — and if the individual is not consulted as to his wishes in the matter, we have law in Stammler's sense, whether there is a State in the strict sense or not.

This difference has its consequences. It makes it possible to discuss the justice and injustice of a law without having to go outside of the law. Law is no longer a fiat of a sovereign who creates it. In fact according to Stammler the actual origin of the law in the concrete sense is a question of history or psychology with which philosophy is not concerned. The philosophical concept aims to give the essential elements of the thing in question, but the question of origin is not essential, any more than the question whether the law is written or oral. To be sure, a critic might say that it is all a fight about words. What law is, he might say, is a question of definition. And whether a given attribute of law is or is not universally valid is similarly a matter of definition. The four characteristics given by Stammler are indeed universally valid, because Stammler would refuse the name of law to anything which failed to satisfy those requirements. He would deny universal validity to Holland's definition on the ground that law need not be confined to the State; it may exist in a non-political society. But for Holland the characteristic in question is universally valid because he refuses to recognize a rule of action as law which is not the order of a sovereign political authority. What is to decide between them? And does it make much difference? Whether the justice of a law is a legal or an ethical problem is once more a question of words and definition. I confess to a leaning in favor of such a critic, without any diminution in my admiration for Stammler's rigor of logical method.

But while the choice between two equally plausible definitions may seem arbitrary, preference should be given to that which gives the better results. And here it may be said that, as we shall see later, Stammler succeeds in deriving a great deal from his definition which does not lie in Holland's program at all. This is to justify a non-pragmatic philosopher by a pragmatic test. Stammler would repudiate such a test.

In all his analyses Stammler insists with all possible emphasis that the philosophy of law must deal with pure forms of legal thinking, *i.e.* with concepts which contain nothing of concrete legal material. Thus the concepts of marriage, property, agency, are not concepts of the philosophy of law as such, since they are not applicable to all law and contain matter in addition to form; whereas the four elements in the definition of law satisfy the requirements, since they express the form of thinking which one must have if he is to think of anything legal.

The completeness of the definition Stammler proves from the fact that in deriving it he did not begin with legal propositions and unmethodically endeavor to enumerate characteristics applicable to them, but his method was to analyze the possibility of modes of thinking, taking care to leave nothing out.

Having established the concept of law, he then proceeds to derive what he calls the categories of law, a sort of intermediate concept standing between the definition and the specific legal institutions and regulations. These categories, however, are also purely formal concepts, *i.e.* modes of thinking implied in all legal matters and logically determining them. They are once more universally valid and contain nothing specific. To be sure that they are enumerated in full, he derives them from the four characteristics of law as expressed in the definition—namely, volition, binding together, sovereignty and inviolability.

Since law is a mode of volition, and volition signifies using means to realize ends, law as such must in all cases determine certain persons or things or acts as ends in themselves and others as mere means. Hence arise the concepts of "legal subject" and "legal object." Similarly he derives from the other three elements of the definition the following pairs of categories in order: "legal ground" and "legal relation," "legal supremacy" and "legal subjection," "conformity to law" and "opposition to law."

It is not necessary to go into the details of Stammler's logic and to reproduce his manner of derivation of these categories of law. Suffice it to say that they are also pure forms of law in that they are implied in all thinking about any legal matter. The reader who is interested will find all he wants and more in Stammler's systematic treatise, "Theorie der Rechtswissenschaft." There are "simple concepts of law," "composite concepts of law," "concept of law in relation to time," and "concept of law in logical relation." The treatment is extremely abstract and is apt to make the reader's head swim.

Of greater interest is the second question with which, according to Stammler, the philosophy of law is concerned. We have found now what law is, we wish to find what justice is. For it is clear that law as such is not necessarily just. Nothing was said about justice in our definition. Law is, as we have seen, a mode of volition combining the purposes of human beings in society. But whether it combines them justly or not is still an open question. It is clear also that such a question as this latter would have no meaning if law were an event in nature like an eclipse and to be studied as such, *i.e.* as governed by the law of cause and effect. The physical scientist never asks whether an eclipse is right or just. His study is complete when he has discovered the law of eclipses, that is the causal relations involved in the happening of an eclipse. Now whether the formation and growth of law is as necessarily determined as an eclipse, is a matter difficult to decide. Unless one is a materialist he will admit that purpose and idea and motive have a determining influence in shaping law. And we are dealing with law as a form of volition, and volition means a choice of means to realize a purpose. Here the question of the propriety of the purpose is not merely relevant, it is the only scientific mode of dealing with the relation of means to purpose. For if we think of the means as the cause

and the purpose as the effect, we have shifted our ground from the realm of purpose to that of nature.

Now if we consider a single act in isolation, as, for example, taking a train for New York, where the means is taking the train and the end is reaching New York, the act is right if it is such as to bring the person to New York, it is wrong if he takes a train going in the opposite direction. In law we are dealing not with an isolated act of an isolated individual. The definition of law indicates that law is a mode of volition which combines the purposes of individuals in society. It makes the purposes of A subservient to the purposes of B, and vice versa. Moreover, society came into existence to enable its members better to realize their purposes. Hence the law, which is by definition not concerned with any individual as such, but with all individuals as combined in society, has for its purpose the harmonization of all the purposes of all the individuals in a given society. Any law which does this is a just law, otherwise it is unjust, for the simple reason that it goes back on itself. It stultifies itself, so to speak, by doing the opposite of that which by its definition it is intended to do.

It is obviously impossible to bring about the harmony in question if every individual is allowed to act so as to realize his individual purpose regardless of the purposes of his neighbor. The purpose of the law must be an all-embracing purpose, in which the conflicting individual purposes find their adjustment. A community in which this is the case, Stammler calls a "community of free-willing men," also the "social ideal." And he defines a law as just which corresponds to this ideal.

To make it possible to apply the social ideal to positive law it is necessary to derive certain principles which follow directly from the nature of the social ideal. It will be sufficient here to state the principles — principles of just law, Stammler calls them — and refer the reader who

is interested in the manner of derivation to Stammler's book.² But it is well to call the reader's attention to the fact that here too Stammler is true to his purpose of dealing only with the purely formal, *i.e.* with propositions which apply to all law without exception and hence do not in their content have anything of specific legal material. It is also well to observe how rigorous Stammler is in his method of analysis, never undertaking any process of reasoning without stating beforehand what it is he is about to do and why. The four principles of just law, which follow from the social ideal, are as follows:

1. The content of a given volition must not be arbitrarily made subject to another volition.
2. A legal requirement may exist only so far as the person under obligation may remain his own neighbor (*i.e.* may be an end in himself).
3. A person who is a member of a community regulated by law must not arbitrarily be excluded from the community.
4. A legal right or power of disposition granted to any one may be exclusive only in so far as the person excluded may still be his own neighbor.

The precise meaning of these principles and their logical relation to one another, as well as the proof of their necessity and sufficiency, are all explained in detail in the work itself.

There are only four principles of just law, but Stammler feels that without further ideas it would be impossible to apply these principles properly to the confusion of human relations. The most important question of all is, how are we (*i.e.* the law) to decide the degree of obligation that one owes to the various members of Society? None can be entirely neglected, and all can not be treated alike.

² "Die Lehre von dem richtigen Rechte" (Berlin, 1902).

For example, it will not do to make every member of society share equally in the property of a deceased member (why not?). And yet the principles say nothing explicitly about this. Accordingly, Stammler introduces what he calls the "Model of Just Law," which, while based upon the social ideal, comes to meet it, so to speak, from below, from the concrete material of positive law. This does not, however, mean that the "Model of Just Law" in its expression contains anything of concrete legal material. All that the model signifies is that in order to determine in a given case what one member owes to another, the person in question must be regarded as occupying the center of an area, around which are drawn concentric circles, measuring by the relative lengths of their radii the extent of the claims their occupants have against the person in the center, the proportion between the claim and the radius being inverse. If one asks on what principle the concentric circles are to be drawn, the answer would no doubt have to be that they must be drawn so as to correspond to the social ideal.

Of interest also is Stammler's conception of the relation between law and ethics. They are co-ordinate; neither can be derived from the other. Justice can not be derived from perfection and truth, nor perfection and truth from justice. Both law and ethics are modes of volition, and hence are subject to the laws of volition as such. Pure volition ('Willensreinheit') is the source from which justice as well as perfection is derived. They are like two branches issuing from the same trunk. Volition as such divides itself into individual or isolated volition, and social or combining and binding volition. Law belongs to the latter, morals to the former. In each case the concept ('Begriff') of the thing is distinct from what Stammler, following Kant, calls the 'Idee,' *i.e.* ideal. Thus any form of associative volition which satisfies also the other conditions expressed in the definition

of law constitutes a law. It may be a good law or a bad law, a just law or an unjust law. Only when it satisfies the ideal of law, namely, the Social Ideal as defined above, is it a good and just law. Similarly, any form of individual or isolated volition which satisfies the other conditions that may be contained in a definition of morals, constitutes morals. For example, a person hates his fellowman, another loves his fellowman. Both of these states of mind, or the volitions associated with them, pertain to morals. One is good morals, the other is bad morals. That a moral volition be good it is not sufficient that it come under the concept of morals, it must satisfy the ideal of morals, which is, according to Stammler, never to make a particular thing as such an end in itself. Now it is true, Stammler says, that law and morals have the same root, purity of volition ('Willensreinheit'), and hence, in any concrete act of a person, it is requisite that it be good legally as well as morally in order to be a good act. Nevertheless, from a philosophical point of view the two fields are distinct and must be treated separately.

Most of us would admit no doubt that the ethical law can not be derived from the juristic law. Or to put it in other words, many of us would be willing to grant that a person may obey the laws of the land relating to property and yet be far from a moral man even in relation to property. Obedience to law is compatible with a violation of the tenth commandment. But there are many who believe that the positive law has been "added because of transgressions," and that, if every man were morally perfect, there would be no need of law. Accordingly, law is conceived as being an inferior morality, or as an institution established to secure a minimum of morality. Stammler is opposed to this. The law of morals as such he says can not determine the institution of property or its laws. For morality deals with the motives, desires and yearnings of the individual, whereas law deals with a

volition superadded to or superimposed upon the isolated volitions of the various individuals, which combines the purposes of all and makes those of one serve as means for those of the other. Law is not the sum of the individual wills, but a super-individual will; and hence no matter how good from the moral point of view the individual wills are, their sum can not replace the combining or associative volition represented by law. The latter has to be studied by itself.

Finally, a word about the relation of legal philosophy to religion. Legal philosophy enables us to find what law is and what justice is. We may study the history of the development of law and observe how the positive law approaches more and more to the social ideal or justice. But all that philosophy can do is to point out what is right, it can not make one do right. There is still one question remaining, why should I do what is right? Why should I be consistent? Why should I strive for perfection? The answer to this is to be found in religion only.

The above sketch presents in brief outline the theoretical part of Stammler's philosophy of law. We know what the essence of law is and we know likewise what justice is. We also know the place that law occupies in relation to morals and religion. A good deal of his "*Lehre von dem richtigen Rechte*" is devoted to illustrative material, in which Stammler shows how to determine in concrete cases a decision in accord with justice. He points out the manner in which the social ideal and the principles of just law are to be applied in actual cases. It is not possible to give the details here; the reader is referred to the work itself. But it is of importance for a full realization of Stammler's theory to show how upon the basis thereof he takes issue with social theories like anarchism and socialism, as also to describe briefly the criticisms he advances against other schools of legal philosophy, namely,

the historical school of Savigny, and the Law of Nature School.

Anarchism is defined by Stammler as a theory of social life which rejects the validity of law as such and puts in its place regulation by means of what he calls conventional rules. One of the elements in Stammler's definition of law, we have seen, is the word "sovereign" ('selbstherrlich') which means that law is a mode of volition which "imposes itself upon the members of society regardless of their desires." The persons subject to the law are not asked whether they like the laws which are imposed upon them, nor whether they desire to be subject to law at all. They are not even asked whether they desire to remain within the territory governed by the law in question. The law is supreme and decides all these questions for itself. A conventional law is one to which a person is subject so long only as he chooses. We have examples of such social rules. The laws of etiquette and of fashion are not imposed upon any one without his consent. They are conditional in their nature. One has to obey them if he desires to belong to the social group in which they are observed. But he may, whenever he chooses, leave the social group and cease to conform to their rules. A citizen of a State cannot leave the State unless the State, *i.e.* the law, allows it. Of course he may steal out without the consent of the law. So he may commit murder in violation of the law. But in either case he is violating the law. A person who resigns from a fashionable club and ceases to wear evening dress is not violating any rule of the club.

The anarchistic point of view is that there is no justification for law as such. Their school is opposed to this element of sovereignty in the essence of law. Society would be better off, they say, if it were ruled by conventional rules, which the members obeyed as long as they pleased and no longer. To refute the anarchistic point of

view it is therefore necessary to prove that the rule of law is the only correct form of social regulation, or as Stammler puts it, we must prove in a universally valid manner that legal force is necessary for the organization of human society.

Here, as elsewhere in Stammler's deductions, it is the method that is of especial importance. His deductions must be universally valid, hence they must not depend upon an induction taken from concrete historical instances. When he says that legal regulation is necessary he does not mean physically necessary, or that humanity would perish without it. He does not know anything about that, as he is no prophet. He means logically necessary. If there is to be an organization of human beings generally, and not merely an organization of persons having certain qualifications, then it must be legal organization, for conventional organization can not embrace the infant, the insane, the doting, etc. For they can not consent to the laws. In their case the organization must be legal. But, says Stammler, only that form of organization can have universal validity and justification which embraces all persons without regard to their peculiar qualities. Hence legal organization alone is justifiable.

I confess I fail to see the force of this argument. Why the adults and the sane must submit to the same form of organization as is required for infants and the insane merely because the expression "organization of society" contains in itself no discrimination of persons, I can not see. This vice of abstract logic taints all the reasoning of Stammler. It is the very essence of his method and constitutes his strength as well as his weakness.³

³ The deduction in the text is based upon *Stammler's* "Die Theorie des Anarchismus" (Berlin, 1894). In his systematic work, "Theorie der Rechtswissenschaft" (Halle, 1911), 501 et seq., he uses a slightly different form of argument to prove the same point, one more abstract and more rigorous. It is less obviously inadequate because less clear on account of its abstraction.

Socialism is the direct opposite of anarchism. Instead of denying the validity of legal force, the socialistic theory insists on its more extensive application. A good deal that is now, in the individualistic State, left to the choice of the individual, freedom of contract for example, would under a socialistic régime be strictly regulated by law. This difference between individualism and socialism Stämmeler characterizes briefly in the words "Unitary economy" ('Einheitswirtschaft') and "Free contributions" ('freie Beiträge').

More particularly, the socialistic theory demands the collective ownership of the means of production. Now Stämmeler as a philosopher is not interested in concrete proposals as such. These are a question of practical politics. As a philosopher he demands to know why a given proposal is made, and, since it is a social proposal, "why" means what purposes it is intended to realize and what justification there is for such intention. Moreover if the justification is to be of scientific value, it must be "universally valid," *i.e.* it must be the logically necessary consequence of a universal mode of arranging and ordering our ideas.

Now socialism as a scientific theory is based upon the materialistic conception of history. As in natural science matter and motion are the principal elements from which all phenomena derive, so in the social life of man, the economic phenomena constitute the matter, and their variation determines with necessity the other social phenomena of an ideal nature, like law, morals, religion, and so on. Hence, the argument proceeds, as the phenomena of production have undergone a change between the Middle Ages and modern times, the ownership of the means of production must also necessarily change. In the Middle Ages the individual workman owned his tools as well as the product of his labor. Now the tools and the product are not owned by the producer. This brings about a

conflict between the organization of mass production and the anarchy of the world market,⁴ which necessarily will lead to the collective ownership of the means of production, namely, the new political and legal régime of socialism.

Stammler's criticism of the socialistic theory is characteristic and instructive. A philosophic theory must be universally valid and unchanging. To be universally valid and unchanging it must be formal, *i.e.* it must not contain any concrete material, since it must be applicable to all possible conditions within the field with which it deals. It must express the logically indispensable method for unifying forever the stuff of which it treats. And since concrete historical material is constantly changing, no formula containing such material can be universally valid. But the socialistic formula is precisely of such a nature. Collective ownership of the means of production is not a purely formal principle. It is a general principle to be sure, but it contains a specific material content. It can not be universal. It may in certain cases be justifiable, in others not. And how do the socialist theorists justify it? They do not justify it at all. They say that it is a necessary outcome of their conception of history. Change in economic phenomena of necessity produces change in law and politics. To this Stammler replies that economic phenomena presuppose social rules rather than determine them. Neither can be thought without the other. And besides, assuming their contention to be true, what has natural necessity to do with justice? Justice means accord with the social ideal. The social ideal has to do with social life. Social life means co-operation of men where each uses the purposes of the other as means for his own purposes. Law regulates this mutual combination of individual purposes. Any scientific formula, therefore, which judges of social rules, must consider the

⁴ Cf. *Stammler*, "Sozialismus und Christentum" (Leipzig, 1920), 58 et seq., esp. p. 61.

relation of means and purpose and not that of cause and effect. To justify a specific form of social regulation it must be shown that it is a proper means for a proper purpose. The naturalistic study of social phenomena is altogether irrelevant to the purpose. Accordingly, Stammler does not deny that under certain conditions the centralized economy of the socialists may be desirable. He denies to their formula philosophic value. It is not the kind of formula that can satisfy a philosopher.

From what has already been said and illustrated of Stammler's method of approach to the problems of law, it will not be surprising to find that of the various schools of jurisprudence, that of Savigny, the so-called historical school, least meets with Stammler's approval. The method of this school is all that a philosophical method, according to Stammler, should not be. He takes issue with the principles of the historical school in the earliest of his legal-philosophical writings.⁵

The advocates of the historical school of law are occupied in discovering the actual causes in the origin of law, by means of historical investigation. The essence of Stammler's criticism is easily told. If the historical school really has no other interest except to find out what actual causes have been active in the origin of law, they are dealing with concrete material and can lay no claim to being a philosophical school. For a philosophical method in law consists in a knowledge of something other than a specific legal system. Stammler names two such questions, which every legal philosopher and philosophical jurist is driven to ask. 1. Is the law that is, the law that ought to be? 2. How is it possible that law may arise from the violation of law?

It is clear, says Stammler, that the first question cannot

⁵ "Über die Methode der Geschichtlichen Rechtstheorie," in "Festgabe zu Bernhard Windscheids fünfzigjährigem Doctorjubiläum" (Halle, 1888).

be answered by the historical method, for the latter is restricted to matters of fact, whereas we are dealing with matters of judgment. The clearest explanation of the ways in which a thing has come to be can tell us nothing about the rightness thereof. The latter is an entirely different question. To be sure, if one can prove that a given effect is solely determined by physico-mechanical causes, the question as to its fitness becomes meaningless. But the historical school has not raised this question. They merely trace the actual facts, but are not ready to say, having no ground for doing so, that the legislator is determined in his function by purely physical causes and can not be influenced by reason in the direction of the right.

Stammler also proves that the second unavoidable question mentioned above can not be answered by the purely historical method. The reader who is interested is referred to the work itself. The conclusion that Stammler draws is that the historical theory is not a philosophical theory at all, though its advocates claim that it is. And not being a philosophical theory it is not in the interest of science or of practical life to pretend that the historical study of law is an adequate mode of treating it. The question that is uppermost in the minds of the intelligent laity is not whether a given rule of law can be explained historically — to explain a thing historically, says Stammler correctly, is to confess that it has no longer any sense or meaning — but whether it has a rational explanation, *i.e.* whether the rule ought to be as it is, whether it is in accordance with justice. The reason lawyers and jurists are held in so little esteem by the people is because the latter envisage a legal question from the purely technical point of view. The only questions they ask are: Is this particular rule consistent with other well-known rules, and if they are of a scholarly cast of mind, they also desire to know how the law happened to have received the form it actually has. But the statesman and legislator must

have other considerations besides those mentioned, and if the professional jurist has by long habit and practice caused his legal judgment, other than the technical and the historical, to atrophy, it is no wonder that he is found useless as an adviser on matters social and political. This Stammler wrote in 1888 in Germany. To what extent this criticism is still applicable to-day in America, the reader is left to judge for himself.

It is clear then that a legal theory that deserves the name scientific must undertake to answer the question, how can we tell whether a specific law is just or not? Or in other words, what is justice?

The historical school of law, usually associated with its greatest exponent Savigny, was founded by Gustav Hugo, and it replaced as a matter of fact the Law of Nature School connected principally with Hugo Grotius, though in one form or another going back to the Stoics or even to Aristotle. The interest shifted from the a priori deduction of what law ought to be according to nature and reason to an inductive study of the factors actually involved in the development of law. And this led the exponents of the new school to deny that it is possible to state a priori what laws are just and what are not. They pointed to the variation in laws of different times and places, and to the different rules of law which passed as just in their time and place. Accordingly it became customary to say that the historical school refuted the law of nature theory. Stammler takes up the cudgels in behalf of the latter. Not only has the historical school actually failed to refute the law of nature theory, but it was in the nature of the case impossible for it to succeed without abandoning its point of view as a historical school. For as long as its sole method is historical investigation, the only thing it might possibly prove is that there has never been such a thing as an actual system of law based upon nature or reason. This would not in any way affect

the law of nature theory. For an empirical investigation of facts can never maintain that the conditions it has discovered are permanent and universal. Hence the possibility is not excluded that a law of nature may be an empirical possibility in the future. Besides, Stammler characterizes in this place the law of nature school broadly as the theory that it is possible by reason to establish a criterion of justice, not a ready-made system of law that would be just for all time, but an ideal standard, in itself unchanging, by which all laws may be measured to determine their justice. This being so, we can go further and grant that not merely in the past but also in the future a body of law formulated by reason to remain for all time is an impossibility, and yet a formal criterion of universal validity may be possible. Any attempt to show that the latter is impossible means an abandonment of the historical method.

Does Stammler then advocate the Law of Nature theory? The answer is, in one form of the theory, yes. If by Law of Nature is meant a law or system of law which is in agreement with nature or reason and hence should remain forever as absolutely just, Stammler is realist enough to deny that any such thing is possible. No concrete, specific thing, whether it be a physical phenomenon, or a human endeavor, is free from the law of cause and effect and continual change. There is no legal *content* that is just at all times. If it is just to-day, it is bound to become unjust when the circumstances change. And this was the error of the early exponents of the Law of Nature School. They were seeking a system of law that would be absolutely, and hence for all times, just. This is a chimera. But if by law of nature is meant the theory that it is possible to establish a formal criterion to serve as a standard by which the justice of a given law may be judged, Stammler is in favor of such a doctrine. It is precisely the doctrine Stammler advocates and defends.

But he insists with great emphasis that the standard or criterion is not in turn a law. It has no specific legal content, and hence is applicable to all legal content. By it legal contents are judged and characterized as just or unjust. Instead of Law of Nature, Stammler speaks of the Theory of Just Law. Just law, like the law of nature, is a law or laws with specific legal content which is in accord with the standard. It is then objectively just, but not absolutely just. For the moment the circumstances change the same legal content will no longer be in accord with the standard and hence will cease to be just. He also calls his theory "Natural Law with variable content," an expression, the meaning of which is clear from the preceding discussion. What this standard is and how one is to obtain it, has been set forth in the first part of this paper.

Stammler is the leading legal philosopher in Germany. Temperamentally he is a philosopher and not merely an exponent and defender of a certain theory. His style contrasts strongly with that of the other great German jurist, Josef Kohler, who died recently. Kohler was a neo-Hegelian, though in his treatise on legal philosophy⁶ there is little Hegelianism and less philosophy. Kohler makes great pretensions and is very severe on those who differ with him. Especially stringent and unsympathetic is his attack on Ihering.⁷ He does not spare Stammler.⁸ The criticism is dogmatic, disposing of his opponents in a few lines and treating them with an air of superiority and almost contempt, in a manner unworthy

⁶ "Lehrbuch der Rechtsphilosophie" (1909); English translation by A. Albrecht, "Modern Legal Philosophy Series," Vol. XII (1914).

⁷ Cf. "Rechtsphilosophie und Universalrechtsgeschichte," in Holtzendorff's "Enzyklopädie der Rechtswissenschaft" (7th ed., 1915), Vol. I, p. 13; also "Lehrbuch d. Rechtsphilos.," p. 16, English translation, p. 25.

⁸ "Rechtsphilosophie," etc., p. 12; "Lehrbuch," etc., p. 16, English translation, p. 26.

of a great and serious-minded man. After all, our helpless struggle in the face of the unknown should make us all modest, and the fool alone deserves the treatment that Kohler metes out to Ihering and Stammler.

Stammler never disposes of his opponents in ipse dixits. He takes every suggested theory seriously and analyzes it from his point of view in an objective, unbiased and impersonal manner. He does not lose his temper, and his style is a reflection of his calmness of mind.

He has been criticised for his extreme abstractness and obscurity. The criticism is well taken. He could make himself much clearer if he were more free in illustrations. But at the same time the very essence of his method is abstraction. He is dealing with the formal aspect of law and not with its material aspect. The manner in which he sets the problem and the method of solution seem to be the most promising in the field at the present time. After all, the most important question in law is justice, and we all expect the philosopher to attempt a formula of this fundamental social concept. And there must be something common in the meaning of the various words for justice in all languages, ancient and modern, else why regard them as equivalent? This common characteristic must be abstract and formal since concretely the terms differ. It is however easier to hit upon a definition of justice than it is to prove that it is correct, and, what is more, to prove that one ought to pursue justice. All this Stammler endeavors persistently, methodically, vigorously and copiously to accomplish. Has he succeeded? Far be it from the present writer to answer dogmatically. Some of Stammler he can not follow, some more he suspects is artificial and without particular value. The principles he announces are some of them not new, and in their abstractness seem to be so general that it is possible by means of them to prove any concrete situation either just or unjust. Or at least a situation that was

doubtful before seems just as doubtful after. And yet it is a problem we can never get away from, and it is to the credit of Stammler that he alone of the modern legal philosophers has undertaken to grapple with it in an adequate way.

INTRODUCTION
PROBLEM OF JUST LAW

*Τὸ γράμμα ἀποκτείνει, τὸ δὲ
πνεῦμα ζῶσποιεῖ.*

The letter killeth, but the
spirit giveth life.

PAUL.

THEORY OF JUSTICE

INTRODUCTION

PROBLEM OF JUST LAW

§ 1. The two kinds of legal science. § 2. Theoretical legal science.

§ 1. *The two kinds of legal science.* — The study of legal science may be undertaken with a twofold purpose. We may aim to master a body of law historically given, regarding its knowledge as a sort of end in itself. Or we may bear in mind that legal rule is only a means in the service of human purposes, a conditioned means by which a certain result is to be attained. In the one case we are satisfied if we make clear the meaning and real content of definite rules and regulations, apprehend them as a unit, and present them in systematic order. In the second case we raise the question whether the law thus given is a right means for a right purpose. Let us call the former *technical*, the latter *theoretical* legal science. The characteristic of all applied science is that it has to solve a problem defined by the material. It must not ask how the aim presented to it may find its place in the absolute unity of consciousness. On the other hand, it is the essence of *theory* to rise from the particular case *to the highest law*, and then again, to descend methodically and gradually, without making any leaps, to the solution of special questions.

Technical legal science, as the concept indicates, has to do with reproduction only. The definition of Philology given by Böckh, namely; — “To know again what was once known,” applies even more properly, perhaps, to legal science. Whether we have to do with precisely defined sections of a code, or with the looser principles

of legal custom and judicial practice; whether our discussions turn about a so-called real idea of the legislative power, or whether we picture in fine detail the necessary consequences of legal enactments; in all cases it is a reproduction of a volition which is present and which is presented here because it exists. The fact that technical legal science, as it becomes more perfect, begins to use abstract concepts, does not change the matter. For these concepts are meant only as a framework for the apprehension of particular laws, and are to be used for the purpose of reproducing the latter. When this reproduction is accomplished, the plan of the work is completely fulfilled.

For this reason the emphasis in recent times laid upon *general legal science* or *principles of legal science*, does not really take us any further. This discipline treats of the general concepts which are independent of particular divisions of legal study, and which are used in the logical development of all legal doctrines. But here, too, it is clear that this work remains within the limits of technical legal science. For these are again only secondary means for controlling a definite problem, in order to ascertain the meaning and purpose of positive legal rules. The ultimate question here asked, the highest apparent aim, is the illumination of the content of a certain legal will. This particular will is for the investigator a problem in itself. And no matter how many particular laws one gathers together as the object of special knowledge, one never gets beyond the merely technical object of making clear a given volition once expressed.

This drawing of a firm line of division has certain advantages for the jurist. In so far as he makes it his purpose to know, as well as he can, what the intention of the positive law really is (in combination with the art of applying the law), he is able to bring to a higher

perfection the juristic art so conceived, and raise it to the rank of a science.

Every state of mind which aims at unity, and is perfected in its attainment thereof, is science. Science differs from information by its striving for unity. It is called *pure* science or theory, in the best sense of the word, when the unity conceived of is absolute, and presents the idea of perfection independent of all material. On the other hand, it is a technical science if it is satisfied with a knowledge which is limited every moment to a definite material.

But this voluntary self-limitation must not be accepted as an axiom. Who does this — and many a juristic positivist has done it — selects as a final aim of his work an object which can have real value only as a relative means for a good end.

This statement needs no detailed proof in the present connection. For however we may picture to ourselves the institution of law in its origin, formation, and extinction, so much is certain, that it expects a certain mode of behavior on the part of those subject to it. In commanding or forbidding a certain state of things, the law offers itself as a conditioned and serviceable means for one or more, or perhaps a great many, purposes to be attained. It is the desire for a complete illumination of this product of volition that raises it in the mind of the technical investigator to a final purpose for him. The definite positive law is removed from the unlimited mechanism of means which were also ends, and of ends which are also means. It is laid aside and receives a kingdom of its own conceived as a conditioned absoluteness.

This is not without its disadvantages. The spiritual eye, too, accommodates itself. He who accustoms himself always and exclusively to regard a fixed and defined surface nearby and to trace its peculiarities, will easily lose his sharpness of vision for that which lies round about

him. And so it may be that technical legal science is especially responsible for the production of what has long been known as the formalistic attitude of the jurist.

Now, what is this *formalistic* manner? Evidently nothing else than this, that one regards as ultimate an empirically conditioned object, in this case a specific body of law. He takes a positive norm as the highest command, without taking account of the fact that it is merely a means.

And then comes a well-founded dissatisfaction with such formalistic manner. The man who has learned nothing else than to draw lines to a given point, will appear narrow to the one whose outlook embraces all of geometry. And he who actually regards the apparently fixed earth as the immovable center of the universe, will scarcely measure well by the standard of him who directs his glance upon the whole sidereal system.

The danger of formalism is especially great for legal science. For legal regulation represents, in the concept of society, the determining form; whereas the common activity of the persons united constitutes the matter of social existence determined by that form. In the actual coöperation of man, which constitutes communal life, the two elements of regulation and common activity may be separated. The former, as the formal condition, may be considered in its content by itself; whereas, the consideration of social economy, independently of the rules conditioning it, seems impossible. For this reason, legal science is necessarily *formal*, in the way indicated. Its results are independent of the actual practice within the ordered coöperation in question. Legal science must make clear the content of a definite body of law without taking account of a special form of social economy. And this is the peculiarity of every system of ideas which presents itself as the formal condition of something else. Form can be scientifically treated by itself.

Now we understand the difference between a *formal* science and a *formalistic* manner of consideration. The former is an investigation the results of which are the conditions of other knowledge; the latter is simply a tendency in a given field which treats a concretely determined object as if it were the absolute unity of consciousness. Legal science belongs altogether to formal science, because it concerns the form which conditions social life. The danger of formalistic treatment threatens only that technical legal science which is limited to itself.

An attempt has been made to obviate this danger. And it is interesting to see how, within the limits of technical legal science, a distinction has been made between formalistic and teleological treatment. In the latter we must gain a knowledge of a definite body of law, not merely from abstract legal concepts, which legal science has hitherto gained and on the whole properly utilized for its purpose, but also by observing the concrete purposes which led to the establishment of the law in question. The former might then be called a *formalistic* presentation in a second and narrower meaning of the word.

This is, however, a very fluid division. In determining the actual meaning of a particular system of law, we have to use now the one means, now the other. And it will be hard to show that the jurists of a given period made use exclusively of the one or the other process. It is only a question of the relative predominance of the two methods.

In any case, the division just spoken of has nothing to do with the consideration urged here. It remains, as we have observed, within the limits of technical legal science, because both the modes of exposition named are concerned only with making clear the meaning of a given legal system; and they conceive their purpose in a merely technical fashion, regarding their limited aim as absolute law. The insertion of the concrete purposes which were

decisive in the establishment of a given law, does not change the technical character of the work, because they are regarded only as facts. They are held fast in the form in which they present themselves, not in order to be welded into the universal idea of purpose and to be judged in its unity; but they are merely used as tools to make clear, by means of them, any doubts in the meaning of a positive law, and are then dismissed.

But this does not help resolve our doubt as to what is the good of juristic activity as such. A satisfactory answer to this question must be derived from human intellectual activity as a whole. And the peculiar activity of the jurist must form an integral part of this whole, to be sure. He who defiantly rejects such consideration and takes refuge in the claim that it does not belong to his task as a jurist, exposes himself defenselessly to every radical attack upon the dignity and the value of his efforts, and is unable to resist doubt of the very principles of his undertaking.

The complaint has been frequent and bitter that juristic work, as such, is unpopular. There has been talk, also, of an estrangement between jurists and laymen. But it seems that the true explanation of this social phenomenon has not been understood. It is due to the isolation of legal science as a technical study. Legal science, by making its technical purpose a narrow axiom of absolute value, instead of regarding itself and its object as only a subordinate member in the whole of social existence, necessarily lost all relation with the intellectual life of society. And this positive limitation, again, justifies the expression of Luther, "A lawyer who is nothing more than a lawyer is a poor thing indeed."

In vain is it proposed to fill the gap by giving more legal knowledge to those who work thus at haphazard. A person who retires into solitude and then feels lonesome is not acting very logically when he invites others to share

his life of a recluse. It is not the lack of knowledge of positive law that has caused the estrangement; hence the increase of legal knowledge would not banish it. The cause is the treatment of positive law and its teaching *as an end in itself*. And in this opposition the culpable party is he who turned the means into a final end.

The lawyer can never sufficiently avoid this charge by personal union with other intellectual interests. This would concern his personality only, and would not remedy the cause of the complaint.

Accordingly it is our duty to give the study of legal science a harmonious position in the unity of our volitional consciousness, and to assign the law its proper place in the realm of purposes. We must teach the conditions under which a legal rule is the right means for a right end; — by what method we can secure it; — and how this volition may be carried out in practice. Hence, next to the preparatory activity of mere technical legal science, there is needed, to supplement and complete it, theoretical legal science.

§ 2. *Theoretical legal science.* — When we distinguish two kinds of legal science, we must not think of them as differing in *the material treated*. Both parts of the investigation have to do with the same thing. The material is always the same. Both of them have to do with a treatment of *positive* existing law.

This must be particularly kept in mind in the study of theoretical legal science. Here our purpose is not to draw up an ideal legal system, but simply to treat of the law which history has developed. Nor is it our intention to conceive of a new mode of origination for law, to develop, for example, special legal rules from pure thought. On the contrary, all law made possible in experience forms an object of investigation for theoretical legal science, and we are not at all concerned with a peculiar mode of producing law. If we wish to form a proper conception of the

essence of theoretical legal science in its relation to technical, we must from the very first reject the idea that there is here a difference in the *genesis* of the law; as if technical legal science had to do perhaps with a law born within historical experience, while theory were concerned with a legal system which came from elsewhere. No; as far as the origin of the law is concerned, there is no difference at all between these two modes of study.

The possible division of which we are speaking is to be found in *the difference of tendency in the investigation*. What we are trying to introduce and to carry out, is a difference in *the formal treatment* of one and the same subject, — law as it originates in history.

While technical exposition regards positive law in its definite form as an end in itself, theoretical exposition looks upon all specific rules as means to an end. The latter, accordingly, inquires after the real value of the means employed, and undertakes to criticise and to guide the terms of legal rules.

And, if we think the matter over carefully, why should we timidly evade this inquiry? The only important thing is, not to leave its solution to individual inspiration which is the outcome of impressions gathered at random, but to find a method (and to teach and practise it when found), by which it would be possible to test critically and convincingly any answer that may be given.

As long as we undertake to judge justly human action, we must necessarily lay down, as our standard and aim, a will that deserves the name "just." This being the function of law, there arises for us a problem of the theory of just law.

In consonance with the idea of theoretical legal science, we must frame the problem: In what way can we determine with methodical certainty whether the content of particular legal rules is right or not? And, What other legal rule would in the special circumstances of the given

case answer better the requirement of objectivity in the institution of legal rules?

Theoretical legal science is therefore a study of method. Although, like the technical branch, it takes for its material the law as developed in experience, it nevertheless investigates it in a manner of its own, and requires for the building up of its system of ideas a fixed method. And not merely such a method as will enable us in general critically to approve or reject, but also such as will guide us systematically in determining in positive fashion the right decision for a given case.

Now, by what line of thought can this method be discovered? The answer is, *in avoiding internal contradiction*. No conduct must be approved as right which, if it became universal, would destroy the fundamental idea of legal society; we must rather so order our life in common that in every action it will be in harmony with the final purpose of the law. "Fac ea," says a well-known saying of Thomasius, "quae finem cuiusque societatis necessario promovent, et omitte ea, quae istum necessario turbant."

Accordingly, our investigation must aim to discover the fundamental principle of law, and we must work out a theory which will enable us, by an unbroken chain of reasoning, to pass from the principle of law, as such, to specific questions. We thus arrive at the definition, that *a just rule of law is that rule which, in a given case, agrees with the fundamental idea of law in general.*

We shall now be able to see more clearly the relation of the two kinds of legal science above described, in their separation from each other, as well as in their ultimate coöperation. As we said before, the material they treat is the same; the only difference being in the tendency of the investigation. This may either merely analyze the material in technical fashion and present it in the same manner; or take it up again as a link in a chain which is

formed in the mechanism of means under the highest law of the will. The two modes of working over the same subject cannot help, therefore, being combined to form a unit.

Technical legal science accordingly appears as the condition for the attainment of just law; as a necessary prerequisite, in fact. It would be absolutely mistaken to suppose that technical legal science is of inferior value, because its exposition is confined to a momentary purpose. Its function, namely, the clear illumination of the legal material empirically given, and its coördination and concrete unification is an indispensable preparation for theoretical legal science with its problem of just law above described. Until we have made clear the content of a legislative system as an actual expression of the will, we can not, evidently, think of determining correctly its objective value.

On the other hand there is no other possibility of showing the *raison d'être* of technical legal science than this, that it is the indispensable condition of *just law*. Every other attempt to prove this and to derive therefrom a fitting standard for judging the value and objective significance of juristic work must necessarily fail.

If we praise a lawbook or essay for its clearness, keenness, and penetration into the meaning of definite positive law, we are still evidently within technical legal science; and in so far as, and just because we praise it for its technical achievement, we have not yet shown its significance for the intellectual progress of humanity. In order to do this, it is necessary that the work should form a part of this entire development, as a useful means therein; that it should appear as a necessary framework for a *good* condition of social life. This can occur only through the recognition of its formal necessity for the attainment of just law, otherwise not.

It is a complete mistake to test it by its practical use-

fulness, as has been often done. For theory and practice are distinct only as *principle* and *application*; but not in their fundamental objective point of view, as are theory and technic. And so (as has been proven long ago) there is no falser saying than that a thing may be good enough in theory, but will not work in practice. For if a thing does not work, this signifies that it is not the proper means for the proper end. And this must in turn be shown by theoretical considerations. To be sure, it may be that the attempt to apply it has been the occasion for discovering the theoretical doctrine to be incorrect. But it can never be that practice alone can offer a *second and independent* standard for the objective value of an activity.

Accordingly technical legal science can prove its *raison d'être* and the intrinsic value of its works, only by showing that it is a means and a necessary condition for the carrying out of *theoretical* legal science in its striving for *just law*.

In this way, it forms a useful and harmonious element in the unity of the conscious will. It loses its isolation, and is united with the whole. Though concerning itself with details, it can now avoid the error of exaggerating the value of the positive, — an error which necessarily alienates every thinker who repudiates the false conception of a will both unconditioned and conditioned.

I close this introduction with the words of Schiller in his inaugural University address: "Miserable is the man who, in the kingdom of perfect freedom, carries around with him the soul of a slave! But still more miserable is he, who allowed himself to be persuaded to accumulate details for his future calling, with such paltry exactitude, . . . Everything that he does appears to him now as but a fragment. He sees no purpose in his work; and yet he cannot bear to live without a purpose. . . . He feels himself cut off, torn away from the connection of things,

because he neglected to unite his activities to the whole of the great world. The lawyer is disgusted with his legal science as soon as the glimmer of a better culture has illumined its nakedness. His true attitude should be to strive to create it anew, and from his richer stores, to improve the defects thus laid bare."

PART ONE
CONCEPT OF JUST LAW

“Jus est ars boni et aequi.” — CELSUS.

CHAPTER ONE

JUST LAW AND POSITIVE LAW

§ 1. The concept of Justice in Law. § 2. Law as an attempt to enforce Justice. § 3. 'Summum ius summa iniuria.' § 4. The unity of Just Law. § 5. 'Privilegium de non evocando.'

§ 1. *The concept of Justice in Law.*—The following inquiries presuppose the concept of *law*. Law is defined by two characteristics. It determines, in *sovereign* fashion, who shall be subject to it, and claims *inviolability* as long as it is in force. The lack of unanimity concerning the formula for the above concept need not trouble us for the present.

We may set aside for the present also the problem, what we understand by the *validity* of a legal norm, as well as the question, whether the *claim to enforcement* of a legal order *as such*, can be justified. We are, therefore, at present concerned neither with a formal clarification of the concept of law, nor with the deduction of the enforceability of law in general.

Our present investigation has to do with the *content* of the law. Not every external regulation which has the formal quality of a legal prescription is for that reason alone just in content. There is also law which is unjust in content; and the question we must now solve, is this: How can we, in a universally valid manner, determine the justice of a possible content of will which may appear in legal enactments?

Just law is a special kind of positive law.—The distinction between the two kinds of legal content can be carried

out only within the concept of law. We must not suppose that positive law fills the entire legal domain, and just law stands opposed to it as shadow or as light. It is a mistake to introduce here the picture of a spatial relation, for it is a question of a logical division. Positive law is divided, according to the nature of its content, into two classes. It is either just or not. And just law is positive law, the content of which possesses the quality of justice. Accordingly, just law is related to positive law as a species to its genus. It can never, therefore, be our purpose to set up concrete rules which would hold only for the former, and would not, at the same time, aim to produce positive law. It is the latter that is in every case kept in view.

It makes no difference, to be sure, for our discussion, whether certain legal rules are now in force, or whether they belong to history, and are obsolete, or whether finally they appear as plans or programs for the future. The distinction we made applies to all three possibilities, to present law, to antiquated law, to law desired for the future. The historical position of a law is of no importance in this connection. In particular the distinction does not mean to indicate that positive law is the law that at present is, or perhaps has been, in vogue, while just law is the law we strive to realize.

Finally, we wish to remind the reader again that it would not be correct to base our division of the law upon the *manner of its origin*, by assuming that positive law is laid down by force, while just law is thought out by reason. The origin of positive law is indifferent for our present consideration. Law comes into being and grows under empirical conditions, and is formed, in its historical course, by means of historically given factors. But the content of that which is thus formed as positive law, is now examined and determined with reference to its justice. In the former case we trace the genesis, here

we aim at a systematic judgment; and the two must be kept separate.

To recapitulate: Just law does not stand outside of positive law as a kind of norm with non-legal requirements; it is not identical in concept with law that we strive to attain, in contradistinction to historically given law; and its peculiarity does not lie in the special form of its actual origin. Just law is positive law whose content has certain objective qualities. It applies to all law, past, present, future. It denotes a critical treatment of a historically growing legal content, in so far as it classifies it systematically as just or unjust. A. Feuerbach was correct when he said: "We must work out a positive science of law; we must not, therefore, overlook either the legal element on account of the positive, or the positive on account of the legal."

We possess the fundamental distinction of just and unjust; and it is also applicable to law. Every criticism of a legal institution illustrates this. And the radical skeptic who would deny the distinction must, if he means to be clear in his own mind, declare that the concept of the just content of a law has no real justification. But in this unavoidably vicious circle he has already admitted the formal possibility of proving, affirmatively or negatively, the objective justification of a thing. In legal questions, this is the same as the concept of the justice of a law in general. We may, therefore, legitimately express a doubt only in the application of our fundamental distinction to a specific legal content; but we cannot doubt the original classification of content into just and unjust, — a classification which is necessarily presupposed in every investigation.

Accordingly, if this distinction is fundamental, we must also be able to show under what uniform conditions and by what formal method we characterize a legal content as just or unjust. That we do this there is no doubt; we

constantly make this division. Again and again, we bring the material of the most various legal matters under the same concept of justice, and affirm or deny its application to them. And therefore it must be possible to have a clear and adequate idea of what we are actually doing, and to get a methodical insight into the general concept of the justice of a legal content, as well as into the process of subsuming specific material under it.

It is true, we have to reckon with a peculiarity of our time, universally prevalent. It is the consequence of an empiricism of long standing, the peculiarity of which consists in ignoring the fundamental methods which help us to determine the content of our knowing and willing consciousness as just. Nay, it seems to have been quite forgotten that all science is nothing else than the comprehension of the particular by means of an absolutely unitary method of consciousness. The concept of a fact or the concept of right is naïvely regarded as something given, whereas they denote a conscious content already worked up in a definite manner. And thus many people lose sight of the fact that it is only a *unitary method* which makes the comprehension of concrete material valuable; and that, therefore, it is proper to form a clear idea of what this method is. Instead of this there has developed *the sense of the actual*, which sees in the uniformly arranged data nothing but the material, not perceiving the method because it is not the material and cannot be.

In this way, many legal writers have lost the power to see that the concept of justice constitutes a problem, and what this problem is. In this manner the error may have arisen that we are again concerned with concrete standards, and that to abstract from them can only mean to formulate an ideal code; or that in our systematic principles we must ultimately go back to a difference in the mode of origin. They have lost the

method of methods, by which we must first apprehend with clearness and nicety those concepts by the unitary application of which a given content of consciousness is systematically characterized as belonging to, or excluded from, the class of the just.

And yet, it is the specialist in legal science who should find it easiest to penetrate into the problem here unfolded; because he is accustomed to deal with abstract concepts. He finds it necessary, for example, to consider the concept of *real* rights. In the same way, therefore, it is possible to conceive the idea of justice, which may then be applied to a definite legal content. We must make it clear to ourselves that we are dealing with a formal quality of positive rights and duties; and that this is the understanding of the concept which we shall develop in what follows.

What we have said so far can only serve to elucidate the problem. The characterization of a definite legal concept as just is a unitary process. It is a universally valid manner of judging. It may be applied to every question belonging to positive law, and represents a *fundamental method*. When we wish to determine, therefore, what just law is, and how we may, by means of it, draw a formal line of demarcation within positive law, we at first abstract entirely from every attempt at applying the concept of justice. Justice is a quality of certain positive law. Its concept must be determined in a formal manner.

In this way, we arrive again at the question: Under what universal conditions is the quality of objective justice present in a specific legal rule?

§ 2. *Law as an attempt to enforce Justice.* — “ ‘I have often asked myself,’ said Petronius, ‘why crime, even when it appears in the person of a mighty Caesar, inaccessible to punishment, always strives for the

appearance of truth, justice and virtue? I believe that the murder of one's mother is fit for an Asiatic chieftain and not for a Roman Caesar. Nevertheless, if I were to perpetrate such a crime, I would not address letters of excuse to the Senate, like Nero. Nero wants to keep up appearances, because he is a coward. But Tiberius was no coward, and yet he justified every one of his steps. What strange involuntary subjection of crime to virtue! Do you know what I think? It is only because sin is ugly and virtue is beautiful. Hence a person with æsthetic sense is virtuous.' " (From Sienkiewicz's "Quo Vadis?")

I do not know whether this explanation of ethical feelings by æsthetic motives is still accepted by any one today; — whether the necessary primacy of the practical reason over the æsthetic judgment is really not yet clear to some people. But we will not argue with them on this score. Our purpose is to hold firmly to the interesting observation that in all social deeds and human institutions is concealed a feeling and a longing for justice; even though this tendency is sometimes described differently and in a roundabout manner.

This tendency of the law to realize justice in the content of its rules is not a secondary matter, which may be present in one case and wanting in another, or be followed or rejected at will within a given body of law. It is given in the institution of the law itself. Ihering has said that law is the "politics of force," which must be exercised by the far-sighted ruler who has learned from experience — "The most hard-hearted, the most incorrigible egoist, guided always by his own interest, and adding experience to experience, gathers a sum of rules of life, all of which tend to teach him the *right* way he has to follow in order to derive the greatest advantage from his power." We oppose to this the expression placed at the head of this section, that every legal rule is in its essence an attempt to enforce justice.

This follows with necessity from the compulsory character of law. As soon as law makes its appearance in history, it subjects to itself in sovereign fashion those who are governed by it. The law alone determines who is subject to it, and under what conditions he may enter the union or be permitted to leave it. This sovereign claim it maintains everywhere in social life.

But this claim of the law to enforcement encounters also fundamental doubt and radical opposition; and must face the skepticism which questions the right of its claim to enforcement. The result of investigation in the philosophy of law is that the compulsory character of law as such, irrespective of its content, is universally well founded, *because law is the necessary condition for organizing uniformly the social life of man* ("Wirtschaft und Recht," § 96).

From this deduction follows inevitably the universal reference of every legal content, in the manner indicated above. If law has no other *raison d'être* than that it is the condition for a unitary society, it would be guilty of a fatal contradiction if it deviated fundamentally from the direction prescribed for it. It follows, therefore, that every legal rule in so far as it is legal and is true to its essential idea, forms an element of a unitary will and a tendency toward justice.

Finally, law shares this necessary characteristic with all data of consciousness. In every act of perception, which is defined as the apprehension of a particular phenomenon, is involved an attitude of the mind toward the whole of knowledge. For perception alone does not yet give us any knowledge. But in so far as we desire to know, and to say, as concretely as possible, what an object is, we imply, in this *being* of the object, a striving for truth; and express the idea that the particular case is embraced in the unity of nature — an idea which stamps the perception as an attempt to know the truth.

And furthermore, in every ethical doctrine, in every religious reflection, there is always the essential desire to teach and feel what is *right*. And the same thing applies finally to the products of art. Everywhere in the infinite variety of particular rules and changing perceptions and endeavors, this one thought may always be observed in its formal uniformity and universality. We find then in the imminent idea of law a parallel to those other intellectual phenomena; though we must expound it in an argument specially appropriate to it.

Accordingly, the relation between positive and just law may also be stated thus: *All positive law is an attempt to be just law.*

Here one may object, perhaps, that the purpose just defined may sometimes be lacking; that there have been instances of rulers and political conditions in which it would be hard to find the idea above mentioned carried out in practice. But individual misuse does not by any means destroy the purpose which necessarily lies in the thing itself. The quacks and healing charlatans may exploit the confidence of their patients; but this does not change the fact that in the appeal they make to their science and art there is the implication, objectively considered, of a purpose directed to true knowledge. So it may very well happen that shameless greed or cynical despotism, whether of a tyrant or of a mob, exploits the instrument of law for its own advantage in subjective fashion. But this does not destroy the idea of legal order, which aims at objective justice.

Nor is the idea of law invalidated by the possibility that a given body of law may so completely miss the element of justice in its enactments that we can scarcely recognize the essential tendency toward just regulation which is inherent in it. In an individual person, also, intellectual darkness may become so intense; his ability to compare his conscious content with that of other per-

sons (the mark of soundness of mind) may be lost to such an extent that it becomes difficult, in such an enfeebled person, to recognize the human being. And yet, reason and the ability to objectify still remain the characteristic marks of humanity. In the same way, also, despite the possibility of rude and perverted social conditions, the tendency toward justice must be regarded as a necessary criterion of the social life of humanity. To be sure, we may find particular examples in history of stunted and undeveloped phenomena. But these can never destroy the universal attribute of all legal content, namely, the progress of law in its striving after justice. For it is only when we think of it in this way that we can justify the claim of law to enforcement.

To be sure, it is only the *striving* in the direction indicated that is the necessary characteristic of law. Whether it is always successful is another matter. A body of law may miss the right way. It may happen that in its enactments it obscures the necessary fundamental idea. In that case the law mistakes its own final purpose, of the right apprehension of which we shall have occasion to speak later. And it happens again and again that in its specific rules it does not come up to the law of just volition. This unfortunate inequality between the fixed goal and the partially attained standpoint requires some further discussion.

§ 3. '*Summum ius, summa iniuria*'. — The contrast last mentioned between the fundamental purpose of law and the partial realization thereof, appears everywhere as a problem. This contrast is not peculiar to certain parts of the law, showing itself at one point, and absent at another. Its appearance is a problem which necessarily arises from the essential nature of law.

This follows inevitably from the quality of the law as a *specific and conditioned means*. Legal regulation is a

command which presents itself from outside to the person addressed, with compulsory force. This external order can never, therefore, be an absolute law for the one subject to it. Law, as a means in the service of human purposes, requires for its justification the proof that it is a right means for a right purpose. This proof is twofold. In the first place, we must prove the law's claim to enforcement; that is, we must show that the character of sovereignty which is involved in the concept of law is an indispensable means for social unity. After we have done this, we can then take up the question of the justice of the *content* of the specific rules of law. Accordingly, so long as we know merely that a certain law has the quality of a legal rule, we cannot, from this alone, infer the justice of the content of this law. In order to have our minds clear on this last question, we must examine it critically.

It is this division of the question which is expressed in the famous saying of Terence quoted at the head of this section. We may render it briefly thus: *Law as a final end is the greatest injustice*. Law is a condition and not a goal; a means, not an ultimate end. Whoever maintains and defends a specific legal rule with definite content as absolute, simply because it is legal, is guilty of an objectively unjust act of will.

The division above mentioned was not altogether unknown to jurists. At the same time, it may be of use to bring it more prominently forward and to emphasize it more vividly for the purpose of technical legal science. For the latter has to do only with the explanation and proper application of positive law as it is. But as a law actually in force does not always correspond to the requirement of just legal volition (even though this be only an obscure personal feeling), it has often happened, in technical legal science, that the meaning of what was actually intended by the law was derived from a considera-

tion of what, in justice, it should have intended. The jurists in this followed the instruction of Proculus: "Non spectandum est quid Romae factum est, quam quid fieri debeat." (D. I 18, 12.) Wishing to see justice in the law, they imagined that it was actually intended.

Insight into the concept and function of just law is calculated to keep us away from such errors. We know that technical legal science has an independent task of its own. By acquiring a clear and sure knowledge of the actual content of valid law, the technical jurist gives us the necessary foundation for building up the doctrine of justice of the content. The first thing to do is to bring before us, with the greatest precision, the actual content of the law as the subjective intention of the legislative power. Whether it can then be proven to be just, is another question.

How this question should be answered must be taken up and decided in a calm objective manner. The jurist must learn to observe an injustice present in a given existing law, 'sine ira et studio'; and must clearly bear in mind the technical limitation of his first problem. For he has to do with two separate questions and processes of thought. Every rule of positive law (past, present, or future) must be determined by the method of theoretical legal science if it is to be true to its fundamental intention of aiming at justice.

Juristic empiricism thinks otherwise. The empiricist imagines that the last named purpose may be attained by technical legal science. And he has attempted to do this in various ways.

Attention has been called to induction from empirical legal facts, by means of which, it is alleged, we can acquire universal legal truths. But an accumulation and analytical comparison of many contents of the legal will can at most give us an average of what was actually once intended. But it does not at all follow from this gathering

of data that that which was actually intended was in its content just. You might just as well determine the concept of a juristic person by means of an induction from empirical legal books.

On the other hand, it has been thought that by investigating the historical course of development of a law, we can find out whether it can lay claim to continued validity, and how it should be modified or replaced if it has not this claim. In answer to this we must observe that the distinction, in a universally valid manner, between just and unjust legal content is presupposed. For it is assumed that for every law there comes a point in its development where simple continuation would produce a condition of injustice, and a change is therefore absolutely demanded. But in this assumption everything has been admitted which we have here laid down as a basis for the purpose of stating the problem in a relevant manner. For what is it that can tell us that the traditional law is no longer just in its content? As this is a universal question for all law, it must be answered in a manner which will apply universally to all social life; and hence is no longer within the limits of mere technical legal science.

Here it may be objected that the aims of practical conduct lie within the sphere of the possible development of what is already given; and that an investigation of what is given is the only thing that will tell us what development is possible, and what directions of the possible development should be furthered or opposed. But here again, the material of our treatment is confused with the method by which we treat it. The concrete purposes which may emerge in the development are empirically conditioned, to be sure. They arise from special social phenomena, which must of course be known and expounded in the clearest manner possible. And this development, in its empirical aspect, proceeds in a cycle of

social life, for a more exact description of which the reader is referred to another place ("Wirtschaft und Recht," § 58). Nevertheless, to apply the predicate "just" to a particular purpose which arises in experience, means to make use of a universally valid process. This takes place in every conceivable legal material, and in all legal development, absolutely; and presents itself as a formal method, which is independent of the limited scope of this or that specific legal institution.

The moment, therefore, we make it clear to ourselves that the subject of our investigation is this formal process in which we apply the character of justice to a historically determined legal content, we begin to see that the course of our investigation is a different one; which does not intend merely to analyze the meaning and significance of certain bodies of law, and then again to present them in systematic order.

§ 4. *The unity of just Law.*—In modern legal-philosophical literature we sometimes find a somewhat crude imitation of the evolution theory of natural science. This theory, however, does not fittingly express the underlying difference between a law as handed down by tradition, and a more perfect one to be developed therefrom. The idea of development may be usefully applied, in a special form, to the whole of social history. But to apply it as a guiding principle to a definite body of law would mean to be guilty of a false analogy.

But apart from this, the idea of development is inadequate even for the statement of our problem. For it is an error to think of restricting the difference between positive and just law to the question of the development of the law that has come down. This is only one possibility of its application. It is important, above all, to make use of the idea of just law also in the carrying out

of civil transactions as well as in public administration, legal advice, and judicial decision.

Especially in our days, legislation is disposed to lay a special emphasis upon the latter. It is not merely a question of laying down or maintaining certain positive regulations; in other words, of considering whether they are on the whole tenable and justifiable as rules of law; but of applying them in a specific case. And this application, too, may be either by way of determining that a particular legal relation exists or by way of carrying it out in practice in a particular situation. Thus, we may take a critical view of property, interest, parental power, as institutions of positive law, and attack them or defend them. But we may also question the inner justification of applying them in concrete instances. We may seek to know whether a given person has a right to be or to remain owner, or debtor, or possessor of parental authority. Or we may investigate how far one may justly exercise his right of property in a given case, without regard to his neighbor or a third person; how much and how the debtor must pay in accordance with just judgment; and whether in a given act a person does not abuse his paternal right.

But whatever use we make of the idea of an objectively and critically justified law, in contradistinction to one that is merely positive — it is always the same concept of just law with the same essential characteristics, and it is distinguished from a merely positive rule.

We must take a moment briefly to illustrate this important statement. The idea in reality offers no difficulty, but there is danger of losing the meaning in the multiplicity of words forming its expression.

In political inquiries, dealing with the enactment of new laws, or with the character of the laws already existing, there is a great variety of expressions for the same thought. We speak of equalizing justice, of fair

distribution, of justifiable demands, of moral obligations, of social ethics; or we appeal to the common weal, public order, general morality, social necessity, and so on. But all these turns of expression mean the same thing. They signify that *the content of law must be just*.

The number of expressions to designate just law increases especially when we come to legal transactions and judicial decision. The reader is reminded of the great number of expressions the Romans had at their disposal to designate goodness and justice: — ‘bonum et aequum’; ‘bona fides’; ‘aequitas’; ‘ius naturale sive naturalis ratio’; ‘boni mores sive mos’; ‘benevolentia’; ‘humanitas’; ‘pudor’; ‘pietas sive officium pietatis’; ‘iusta causa’; ‘arbitrium boni viri’; ‘iustitia’; etc.

The legal terminology of the present day shows a corresponding wealth of expressions, and so does the Civil Code of the German Empire. But the two cases are different. In Roman law we scarcely find a common method determining the choice of the terms used. They appear rather, in the extant fragments of the Roman jurists, as synonyms for the common concept of justified law. But in our modern legislation the case is different. The number of expressions referring to just law is also a large one, to be sure; but they form, with very few exceptions, distinct and consistently used groups.

We are concerned here especially with the following designations. “Good faith” is applied to the performance of an obligation; whereas, in family law, the corresponding expression is the avoidance of “abuse.” “Reasonable” is used mostly in determination of quantity, especially in the reduction of a sum to be paid, or in the appointment of a period (for the doing of a procedural act), and sometimes, also, to designate the quality of a service. “Practicable” has reference to the duty of giving notice, warning, or a hearing. “Valid ground” applies to a justifiable dissolution of legal relations. “Intelligent understanding

of the facts" is applied to the avoidance of an erroneous declaration of intention in a juristic act. It is interesting to observe that the term "equity," or determination according to "equitable" judgment, is regularly employed where it is a question of drawing a line between two parties through a domain which is quite undetermined for either party; as for example, the division of a promised reward between two persons entitled to receive it; apportionment of the several interests in a partnership; a boundary dispute; adjustment where the servient tenement is subject to two servitudes which it cannot carry out at the same time; the determination of a contractual service left undetermined, and so on. We see, therefore, that "good faith" may justify a change in a performance that is in itself well determined (it is also applied in the interpretation of contracts and in case of illegal prevention of the occurrence of a condition or a result); whereas, in "equity" we have to do with a demarcation for which there is as yet no basis in the matter in dispute. At the same time the two expressions last mentioned have this again in common, that they aim to carry out existing legal relations (except BGB. 829). Where it is a question of justifying such relations according to principles of just law, our statutes employ rather, in place of the phrases mentioned above, the expression "moral duty," or they say that a thing must not be contrary to "good morals."

I cannot maintain that this division of the expressions in groups was clear to the editors. It seems, in fact, that the contrary is true and that the terminology was worked out unconsciously. At any rate, it has not hitherto been made clear that all these various expressions in reality go back to a unitary concept, the concept of *just law*.

This necessarily follows from the meaning of the legal concepts, the most representative of which have just been

named. For we must ask, what methodical manner of judgment is indicated by the several expressions which we named? And in every one of those cases, the only answer is that the citizen, the attorney, or the judge must determine the rule which gives the right direction for the question in dispute.

The variety of expressions used by the law signifies that it has undertaken a classification of the possible points in doubt. But they are all of them exemplifications of a single fundamental idea, which embraces them all in its formal universality. If an employee may, without the consent of the employer, give notice when there is a "valid ground," this can only mean that according to right and justice the termination of his service is justified. When the lessee must return, in "good faith," the thing leased, this means again that his duty must be determined in accordance with right and justice; and so in every one of the aforementioned cases.

To judge with the 'ars boni et aequi,' means, therefore, to settle legal disputes in accordance with rules which determine what is objectively justified; and which are, in the given case, just in content. They are particular applications of the concept of just law, but are not, in turn, fundamentally different methods of right judgment in legal questions. Papinianus accordingly says, naïvely and properly: "*Generaliter observari convenit bonae fidei iudicium non recipere praestationem, quae contra bonos mores desideretur*" (D. XXII 1, 5). If we now recall that the justice of a legal content is only a formal property of definite law, it is again clear that we must use a unitary method to determine logically whether a given rule has this property or not. And this is the meaning of the popular expression, that in every question only one side can be right.

From this follows clearly that all difficulties in our theory are due to the concept of justice. The various

problems which modern legislation in particular has raised, in various terminology, for the different groups of legal questions, cannot be solved separately. They must go back to the higher concept, of which they represent certain instances. If we can succeed in clearly delineating this concept of just law and making its boundaries clear; if we can give it the right method which will apply universally, we shall also be able, safely and securely, to carry out its particular application in legal practice.

§ 5. '*Privilegium de non evocando.*'—Now, to what court shall we appeal in order to render a methodical and well-founded judgment concerning the presence or absence of the quality of justice in a legal content?

It seems, at first sight, as if we should look for help from without; and seek information concerning the objective justice of the law from other recognized disciplines. But everything that has been attempted with this object in view has shown itself unsuitable and incompetent.

Primitive religions like to base the justification of political acts as well of legal rules upon an immediate authorization or command of the gods. This is common also in Oriental monotheism. Leviticus and Deuteronomy offer specially striking examples. And the Suras of the Koran present their detailed legal ordinances as divine laws, of which Allah himself, as the lawgiver, is the author. This will scarcely find complete acceptance today in our sphere.

Just law is not opposed to positive law as a strange and independent order, which must receive support and defense from a third source. The epithet "just" has only formal significance, and indicates merely that a definite law harmonizes in its content with its fundamental idea. The only way, therefore, which leads to the desired result is a critical reflection upon the unitary purpose of legal institutions, and the determination of particular

legal phenomena in accordance with this purpose. And this work can never be neglected if we desire to answer the question: What legal content in a given case is just?

It has been thought that this problem could be solved by setting up as a standard of what is just, *respectable and right-thinking persons*. This is, however, a poor solution. For the question arises, again, what persons have this quality, and how can we tell whether such persons, assuming that we have found them, actually are "right-thinking" in the case under dispute? And to this question there is no satisfactory answer. We cannot see, in fact, why the middle term "thinking persons" is used at all. It is all the same whether we wish to find out *what right-thinking persons would say*, or *what is right*. We must not, therefore, suppose that we can in the least solve the last question by giving it another form.

On the other hand, we must not assume that we can improve matters by referring to *good morals*, an expression which, as was said above, the laws sometimes use to find what is just in a given case. This would be a clumsy conception, to think of positive law as referring to a fixed conventional custom as the highest court of appeal; so that a bad law, which cannot yet be annulled by a better custom of long standing, would have to be quietly allowed to remain. This would mean forcing the letter and destroying the right spirit expressed in the law.

Accordingly, the expression above mentioned, as applied in a special case, can properly designate only that no conduct should be legally tolerated which would not be good if it became a general custom. The right method is thus already indicated in the expression. But it says nothing more than that only those legal consequences may be permitted which may be generalized and carried out in harmony with a good social life. We think of the conduct in question as repeated, and if we find that when thus generalized it is not consistent with social life

and its own highest idea, we decide that it is unjust. In this case, too, therefore, a concrete legal event is tried by the principle of law in general, and is determined in accordance with this principle; but is not merely brought before the forum of actual custom which, as an independent subject, forcibly invades the domain of law.

This is the only meaning that the expression "good morals" can have. It came to us as a result of historical circumstances from ancient times. It was sometimes used in Greek ethics; and everybody knows the saying of Menander, quoted by Paul, of the *ἡθῆ χρηστά*, which are corrupted by bad company. The Romans also had it, and expressed it properly in legal terms. There is no saying that expresses it more beautifully than the famous one of Papinianus: "*Quae facta laedunt pietatem existimationem verecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est*" (D. XXVIII 7, 15). With the reception of Roman law this expression came to Germany and was soon translated in various ways. The Palatine Provincial Code of 1610 said that contracts must not be "against good morals, dishonorable, fraudulent, . . . from which follow sin, disgrace and offense." And in the Revised Code of the Duchy of Prussia of 1685 we find: "In fine, one is not obliged to fulfil all contracts which are opposed to God, His holy word, or good morals." And the Bavarian Code of 1756 prescribes that "agreement is not valid in matters which are against nature or are opposed to honor, law and order." Modern laws, too, exhibit sufficient variety of expression. So, for "*stipulationes turpes sive contra bonos mores*," the Prussian General Code says, "Acts which offend honor;" the Code Civil has "*Cause illicite . . . contraire aux bonnes moeurs ou à l'ordre public*" (translated back again in the Code of Baden by the expression, "Against morality or the order of the State"); the Austrian Code has "forbidden"; the

Swiss Law of Obligations reads: "Contracts to perform what is illegal or immoral." And when the Commission of our Civil Code decided to have a translation of "*boni mores*," the latter were a long time in danger of being changed from their inherited plural to the singular. It would not have been a great misfortune.

To summarize what has been said, the accidental expression "good morals," which is sometimes found in the laws, is in itself a harmless phrase, the syllables and letters of which cannot give us the least information for the standard we require. The command not to offend against "good morals" is simply an application of the universal possibility that *just law* be taken as the norm of judging.

And on the other hand, it is not permissible to take the decision concerning the presence or absence of objective justice in a legal content away from the domain of positive law and hand it over to a strange master, in this case to "good morals." The finding and establishment of just law in a doubtful case must take place in accordance with the fundamental unity of legal order in general. For just law is not meant to be a norm having a material of its own and applying to a specific empirical state of affairs, but a law with a definite formal quality. "Good morals" or "good faith," or other such expressions do not designate a rule which maintains an existence of some sort *outside* of law. They are present when a certain law has in its content the formal quality of justice. We may, it is true, properly designate a legal rule which corresponds to these ideas, as the superior norm; but no more so than we speak of a clever person as superior to one of limited intelligence. Hence a norm determined in accordance with "good faith" or "good morals," — or in general, in accordance with just principles, is once more simply a law having qualities of a certain kind.

For example, most earlier laws give the tenant farmer the right to demand a reduction in his rent if, as a result

of unusual ill-luck, his income from the crops is diminished in a considerable degree. Of this right of the farmer the "Report of the Draft of a Civil Code" says that it is "a right that is based merely upon equity and has no legal foundation." This is unintelligible. From the technical standpoint this right of reduction is either legally granted or denied; and has or has not a legal foundation, accordingly. Theoretically considered, the legal decision in every case is either objectively well-founded or untenable; and in the first case it is nothing else than just law. The fundamental error here lies in the concealed idea that *next to* positive law and *outside of* it there is still another norm with a peculiar material of its own; an unknown quantity, which now is christened by the name "equity."

This is connected with the tendency to a narrow empiricism which was mentioned above. To be sure, he who knows and sees nothing else than things empirically agglomerated; he who finds it hard to separate the quality from the object, the method from the matter, and to conceive of a formal method as such, as the subject of a special scientific investigation, may easily fall into the error of supposing that just law and the variously termed applications thereof in the statute book must be again independent quantities of a peculiar experience, moral chimeras, so to speak, having a corporeal existence. Our discussion will, as I hope, remove this erroneous interpretation. Just law is positive law whose content has a certain characteristic. This characteristic we shall determine in this work from the fundamental idea of the legal institution, and without the arbitrary power of a usurping tyrant.

This may be expressed in another way also. The judgment concerning the objective justice of a certain legal content must not be brought in from the outside, but must be derived solely from the imminent unity of the

law itself. Just law must, therefore, neither be constituted outside of the content of positive law, nor must another discipline be brought in as a criterion of the legal content, to regulate it according to the external laws of the former. It is always and solely a question of legal science itself. Just law must be thought of as a specially constituted law; and it must be worked out in a manner which will direct attention simply to the agreement of a concrete legal content with the final aim of the law itself.

The endeavor to make an *a priori* entrance into the domain of law and to subdue its territory with warriors of another tribe, has been going on long enough. Instead of this, if our plan succeeds, its own fundamental principle alone shall rule. But the tables which bore it are lost, their contents are hidden. It will be necessary to dig deep for them. Be, however, the result as it may, one thing must be held fast without flinching and without yielding. The land must not be governed by a foreign power. No force shall determine the concept underlying the rules, which is not native to the law. No judgment shall decide what is just unless it be in accordance with the law's own principle.

But must we not make some exceptions at least for morality? Must we not accept as immediately authoritative for our problem what has often been spoken of as "the ethical views of the time"? Must not the content of just law be derived from ethical theory? We deny this absolutely.

CHAPTER TWO

JUST LAW AND ETHICAL THEORY

§ 1. Legality and morality. § 2. Identity of material and diversity of purpose. § 3. Just law an independent problem. § 4. Ethical doctrine an independent problem. § 5. Union in a common progress.

§ 1. *Legality and morality.* — We may regard it as an elementary fact, generally recognized, that the aim of ethical theory is perfection of *character*, while the institution of law has to do with the regulation of *conduct*. The former undertakes to teach how a given individual in a special case shall be good in his inner resolutions, in the content of his thoughts. Its further formulations are attempts in this direction. And their authority is based solely upon the recognition that they furnish a practicable doctrine for right intention in volition.

Law presents itself as an external regulation of human conduct. By this we understand the laying down of norms which are quite independent of the person's inclination to follow them. It is immaterial whether a person obeys them because he regards them as right, submitting out of respect for the law; or whether his obedience is due to a selfish motive of some sort, fear of punishment, or hope of reward; or, finally, whether he thinks about it at all, or acts from mere habit.

Ethical theory is concerned with the question of the content of a man's own will; in whose heart there must be no opposition of being and seeming. The meaning of law is exhausted in volition which enjoins *other* persons;

having for its purpose not the goodness of their inner life, but the rightness of their outer coöperation. And so far as the law takes cognizance of the intention of the person subject to it, as for example in the matter of debt or of bona fide acquisition, it is always a question, merely, of the agrément of the agent with the content of the particular rules of the law; and not of the purity of his thoughts, in the sense of the absolute commands of the moral law.

This contrast between morality as internal and legality as external is, as has been said, clear, and has long been observed. There is danger of commonplace in citing it. And yet, the greatest thinkers have thought it worth while again and again to lay emphasis upon the difference in purpose and claim of the two kinds of norms. In the philosophy of Socrates we find the contrast as above indicated. Paul of Tarsus is deeply impressed by it; Luther gives it the central place in a mighty system of ideas; and Kant formulates it with fine precision. But they give us only a suggestion of the difference. The systematic elaboration still remains to be done.

As a rule the legal aspect was not much considered, being regarded perhaps as subservient, and as an insignificant means only; and the emphasis in their thinking was directed exclusively to the ethical and religious question. It is possible that a more persistent comparison of the ethical and legal problems would result in the discovery of many useful ideas, calculated to exemplify both fields with true success, and more effectively than could be done by simply dividing them and following out each one separately.

The shaft is sunk which leads us to the vein of gold. We must now work the mine, subduing the hard rock and see what we can succeed in getting. It may be worth while.

If it is true that ethics and law have to realize two dif-

ferent tasks, how is it possible to keep the two combined? Must they really, then, part company completely after having presented themselves together in the early dawn of history? Must they never see each other again, and do their work separately and alone?

It is quite certain that we here meet with considerable difficulties. In the first place, the substance of the two sciences is not yet sufficiently made clear by the distinction above made between regulation of intention and ordering of conduct; and we do not see clearly where we should place the boundary line in actual cases; and what human activity should be referred to the one discipline and what to the other.

The contrast introduced by the demands of morality and of mere legality is, strictly speaking, negative on both sides. To characterize it positively, we must follow them both up in parallel lines. Only in this way will it be possible to obtain a common method of procedure that will be both clear and efficient. By a precise survey of the field we wish to control, by an adequate delimitation of the task falling to the lot of each, and by a systematic comprehension of the result harmoniously aimed at, we shall have realized the community of their workings.

A new and effective impetus for this is given by the progress of the social consciousness, in which the necessary characteristic of law, of which we spoke above, is more clearly marked, and more plainly visible than in former times. To avoid repetition we refer the reader to the preceding section, and proceed further. For in the aim of enforcing justice, the two spheres of law and ethics, hitherto kept separate, approach each other again so closely that the question of the relation of legal judging to ethical doctrine becomes a really live problem. They approach each other in a seemingly indefinite manner, which is not satisfactorily explained by the expression, "ethicization of law." May we not just as well speak of "legalization

of morality"; and what do we gain by it? The answer will have to take account of three considerations.

1. What actual domain belongs to ethical doctrine and what to just law? Is it possible to divide the activity of human volition in its material aspect into two classes which are absolutely distinct and represent our two species of norms; or does not, perhaps, every such expression of the will belong equally to both kinds of norms? If law is actually to go hand in hand with ethics in a definite sense, we must know, also, where the one meets the other in its activity. And since just law aims to judge and determine human acts with objective validity, it might seem that it wished to acquire for itself new provinces which hitherto stood under the exclusive lordship of moral doctrine. Now is it merely a frontier episode, or an actual appropriation of an extensive territory with a change of sovereignty beyond the boundary line? Or is not, perhaps, the right way to decide the case now pending, to establish a joint and undivided dominion of the two ruling powers?

2. The last named alternative will prove to be the right one. *Materially*, just law and ethical doctrine have the same domain. They control and guide it in common, but in a different sense and with a distinct object. Therefore, each one of these must retain its own method and carry it out in its own way, and cannot simply take it over from the other, or merely submit to it. This we shall investigate in two sections, devoting the one to just law, and the other to ethical theory.

3. But the separation of their different problems must not go so far that the two systems of rules with which we are concerned shall remain permanently and absolutely separate in controlling the same material. For both have the same root. They are both concerned with judging and determining human volition; and must, therefore, be subject to the same laws. Hence, neither of them in its isolation is able to fulfil its destiny with complete satisfac-

tion. And it is only in their union that we can succeed in establishing the unity of a fundamental and universal conception for the harmonious formation of which man is constantly yearning. This will form the conclusion of our discussion.

§ 2. *Identity of material and diversity of purpose.* — The various problems which pertain on the one hand to ethical doctrine and on the other to just law cannot be defined by a classification of human acts. We cannot divide the voluntary acts of man into two classes, of which the one belongs to the domain of a purified morality, and the other to just law. This is impossible because we always have to do with the question of the just content of volition. Ethical theory is concerned with the purity of thought, with the perfection of the inner life; just law denotes a content of will which determines in well-founded fashion external behavior. Hence, the difference between them lies not in a certain content of this or that act, but in the difference of manner in which the desire for justice presents itself. The former seeks to realize the good intention of the individual man; the latter aims to effect justice in the external life of society. The acts, therefore, to which ethics and just law refer are the same. The difference is in the purpose at which we aim in regulating the identical material.

Accordingly, every act of man may belong to a twofold set of ideas and may be judged by the rules of just law or considered from the point of view of ethical theory. For in every case we ask the question, whether a given behavior is in its external aspect just, and also whether in such behavior there is the presence of pure intention, the result of the pure will of the agent himself. The kind Samaritan acted according to just law when he took up the injured man and nursed him, and carried his unbidden kindness so far as to advance money to the innkeeper for the care of the wounded man. And yet if he had done

this for the sake of external considerations, to receive praise or to avoid blame, his deed, in the light of our second problem, would not have been good.

This twofold manner of consideration may be found in all acts without exception. Even where a question seems, at first glance, to be remote from one of these two methods of treatment, it is suitable equally for legal as well as ethical legislation. I select, as an example, the institution of friendship and its influence upon the conduct of those united in it. To suppose that this is without the domain of just law would be an error.

The cause of this error is probably the circumstance that we confound the idea of legal order generally with a special form of the same, as if law in general were identical with that form of it which denotes a centralizing command to be enforced. Similarly we identify erroneously the general idea of law with one of its means, namely, direct formulation of definite mutual rights and duties. Now there is no inherent reason why the duty of support or the right of succession and other consequences might not, in technical fashion, be attached to such unions of friendship (witness "affatomy" (adoption as a son) or "blood-fraternity" of the German laws). But as a rule, the social order leaves it to the freedom of friends to determine the details of their legal conduct to one another in their own way. But this is done in the expectation that in this way justice in the doing and forbearing of the communicants will actually be furthered. Considering the usual attitude of legislation in this matter, we have here a regulation which makes use of the special means of the free contributions of the individual to the community. This is a contrast to centralized command. But both of them are in their opposition only different means of realizing the legal order, which embraces with its sovereign force all social existence, and merely allows the free activity of the individual according to its own understanding on the

supposition that this may lead to the welfare of social life. Then the friends themselves create the specific content of the just norm of their conduct. But that which they thus set up forms conceptually a link in the unity of external regulation. And it differs in the tendency of its volition (since it concerns external and mutual conduct) from the question of the intention and ideal devotion of those united.

If, then, in every activity of the will without exception the twofold question arises of the right norm of conduct and of the proper guidance of motive, the answer in each case also to the distinct problems must be derived in appropriate manner from the fundamental laws of volition. We may be permitted a few preliminary considerations concerning the two elements of this proposition; namely, concerning the application of the double question to all acts, and concerning the necessity of division in method.

Three acts have been enumerated in literature which can be considered only from the ethical point of view. They are, conduct of man toward God, toward beings of a lower species, and toward himself. But none of them is calculated to break the chain of reasoning here presented.

The first can be cited only as a vague parallel. Duties toward an absolute being can never be placed in the same line with the obligations demanded by ethical theory. For the latter is based on the idea of humanity, by which man as a rational being must be regarded always as an end in himself. In this sense an obligation to God can have no meaning.

Similarly it is an abstruse idea to speak of exclusively moral obligation in relation to animals, plants and stones. It is true we stand in no relation of legal obligation toward them; they can neither bind us nor can they be bound by us. The statement is no doubt true that "The righteous man regardeth the life of his beast"; for he who allows an innocent creature to suffer without any purpose

shows an obtuseness of feeling, which makes him more than suspect in his good will toward man also, as in the well-known engraving of Hogarth, "The Reward of Cruelty." Animal torture is indeed morally objectionable; but this does not involve anything distinct from the ordinary ethical motive. The purpose of the prohibition is to prevent the brutalization of the ideas, which have to do with human purpose.

On the other hand it is possible legally to forbid abusive treatment of lower animals; as there are punishments for blasphemy or laws for securing religious devotion. But here too it is human society that forms the motive of these norms. The question at issue is correct external conduct toward other men. And the separation of this consideration from the specific problem of ethical doctrine is not touched thereby.

But neither do the so-called duties to oneself lead to a different result. They only form a special case derived from correct volition in the mutual relations of men. A person must not degrade himself any more than any one else to a mere means of his desires; and he must not forget that the community makes him what he is, and that every one has a share in every one else. But when it does happen, we have again the two questions, whether proper social life is not thereby injured or destroyed; and secondly, whether this injury must not be avoided even in thought, and the will guided to proper behavior with devoted intention.

The matter is not changed in any way by a reference to a possible life of man in isolation. Robinson Crusoe did well when he maintained the idea of humanity in his thinking and willing while he lived away from his fellow-men. And we may admit in imagination that it is possible to conceive of men living a solitary life and developing a rational system of volition and an enlightened morality of intention. But this solitary person comes from society

and returns to society. And when his doing and forbearing is judged, it is put in relation to the acts of social persons; just as in thinking of rational beings in isolation, we cannot ultimately avoid considering their meeting with other persons. Attempt to prove the justification or injustice of an imaginary act, and you will become aware that without regard to other persons, in relation to whom the behavior is right or wrong, the proof is impossible.

We have now disposed of the first aspect of the discussion outlined above. There is no human act in which we can not ask both the above questions, Is it legally just, and is it ethically right? The two disciplines have the same material basis, and have reference to the same activity of the will. In contrast to this we must now emphasize more clearly the difference in their methods.

We use the word "moral" in four different senses.

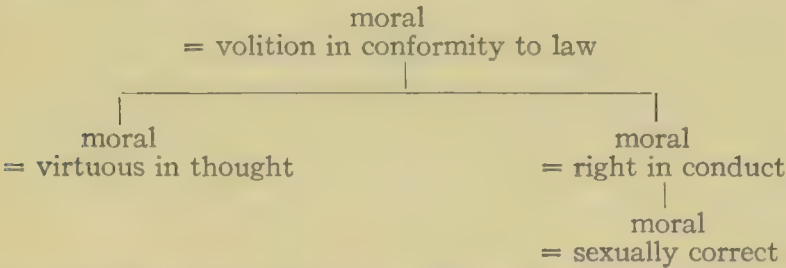
1. We apply it to all right human volition in general, whether its purpose be purity of intention or right regulation of conduct. In this sense we say that the social problem is a moral question.

2. The term is also applied to the special problem of moral doctrine, which has to do with establishing and maintaining purity of intention. Thus the admonition against the self-complacent pride of the Pharisee is a moral doctrine; and so is the great command, "You shall be perfect."

3. A rule is moral which exhibits a particular mode of external conduct as objectively justified, and thus lays down *just law*. "Gifts made in obedience to a moral duty can not be recalled" (BGB. 534). Take the case of a well-to-do man whose brother has become poor from no fault of his own. The wealthy brother supports him and makes him an appropriate gift. Later the recipient of the gift becomes guilty of a base act of ingratitude. The above law decides that the gift can not be recalled unless its original motive was not solely moral. The question now

is, Can the giver say in such a case, My motive in making the gift was to stand well before the public, to avoid this or that unpleasantness; I did not act in obedience to the moral duty of pure love of my neighbor, and hence I may now, under the legal circumstances assumed, recall my gift? No one will doubt that this is not the intention of the law. The law means gifts exhibiting right conduct, not such as arise from pure motive.

4. Finally, the term moral is used as a synonym of correct conduct in sexual matters. In this sense we speak of an offence against morality, and so on. In a formula



We are not concerned here with the fourth use of the term. But we must also leave out of consideration the first meaning of the word. It can offer us no advantage, and there is danger of being led into trivialities. For if moral means the same as human volition in conformity with law generally, then the social question would also belong here, to be sure. But this inclusion would not denote anything very profound as yet, any more, for example, than if one said that the problem of science is a problem of the laws of nature. Accordingly we must be on our guard, in the use of the expression “moral,” not to get into a dispute about mere words, which is clearly not our purpose. For the sake of making the matter itself clear, however, we must be careful, everywhere in our problems of human social life, to keep distinct in our method of investigation the two fundamental questions, Is the inner intention of the agent right, and is his deed just?

A monogamic marriage rightly establishes a relation of complete devotion between persons of different sex. Here it would be more fitting to speak of marriage not as a moral institution, but as an institution of just law. For when a person contracts a marriage, I know at first only that his external act is correct. Whether he can also stand the test of an ethical judgment is a second question. This depends upon his intention in taking that step, whether his motive is true devotion without any *arrière-pensée*, or whether it is perhaps wealth, influential connections, or other motives foreign to the case. We can not escape from the fact that we have here two distinct questions. And it is this difference in which we are interested.

Accordingly those distinguished ethicists are mistaken who endeavor to develop and explain the problem of ethics by referring to the fulfilment of the duties of just law. The two distinct questions can not be made clear in this way. No less a man than Kant, in his presentation of the fundamental law of ethics, uses the following example: "A deposit is in my hands whose owner is dead and has left no paper concerning it", and makes the deduction therefrom that the maxim to increase one's property by all safe means can not be made a universal principle of legislation. But the mere consideration of the duty to return a deposit is not necessarily a part of the problem of ethics as we have just determined it, but is simply a case of right conduct. The ethical question would be, What is the motive that inspires the depositary to restore the object entrusted to him? And besides, the bare duty to return a deposit is not a problem over which one need rack one's brains. But difficult questions of doubt may arise when the relations of the parties concerned are more complicated. And these doubts would show clearly that we must in the first place undertake a distinct investigation of the aspects of the case which concern just law. Tryphoninus cites the following case

(D. xvi 3, 31): "A deponent was condemned to deportation ("deportatio in insulam") for a public crime, and his property was confiscated by the State. To whom must the depositary deliver the property entrusted to him?" And he raises another question. "Must an object be delivered to the person who made the deposit, if the depositary has discovered in the meantime that it was acquired by robbery?" These doubts can not be solved by ethics. The latter is concerned with perfecting the purity of intention and with the motive of "Love thy neighbor as thyself." The desired solution must be found in an independent investigation so far as method is concerned, and in the question of the nature of just law.

One more thing must be remarked. In expositions of law and morality we often find the distinction made between a purified and perfected moral doctrine and a positively laid down law. This comparison is not correct. Morality also grows under historical conditions, and, in its attempts to formulate a system, may easily be exhibited as a positive doctrine. This positive stage of morality must be studied first before an adequate attempt can be made to form a philosophical doctrine of ethics. Accordingly there is a parallelism in the development of the two fields. Positive law and just law correspond to positive morality and rationally grounded ethics. We may for the moment combine the two stages in one, and compare law and morality. But if we wish to take only one of the two stages on one side and institute a comparison with the other side, we must either take the positively formed rules on both sides, or build up the two groups on either side in such a way that they will occupy similar positions in their respective fields in their relation to their respective problems of making human volition conform to law.

Finally, by separating more precisely the two problems of law and morality we determine the material domain of

ethics, so often sought after and missed. And in this way we can fill a lacuna which not even the formal ethic of the critical philosophy has been able completely to fill. The categorical imperative — with its abbreviated formula, "Will freely" — has, to be sure, in its own essence and meaning been misunderstood more frequently and more radically than was necessary. Many have thought that it is meant to be a universalized command in the sense of a moral code. They did not see that it is merely intended as a definition. It is only an expression — the ultimate expression, indeed — for the question, What is "good," as a quality of human volition? The man who thinks he already knows what the concept of "the good" is, and places it in his circle of ideas as a known quantity; the man who is only concerned with the question of the origin of this concept among men, who wishes to know what changes it underwent in the course of history and among the various peoples, or by means of what process we may now come in possession of it; — the man who finds the greatest personal interest in these questions, has nothing to learn from the formula of the categorical imperative. It is meant only for those to whom the concept of "the good" as such is a problem. It is a systematic definition of the concept, and nothing more.

Hence it follows that even after we have established the ethical formula the question still remains open, What is the sphere of its activity? In what acts of the will does the concept thus established find its application? Our answer is, in the personal activity of the individual as it exhibits itself in a legally ordered social life. Accordingly we must first determine the content of just law in its concrete aspect; and the problem of ethics will then be the fulfilment on the part of the subject, with sincere conviction and devotion, of the demands which just law makes upon him. We need not be troubled by the doubt whether the material basis above mentioned exhausts

all the ground that just law prepares for ethics. The question thus arising concerning the completeness of the subject matter of the will as defined must be answered in the affirmative.

The proof is as follows. All critical judging of the rightness of an act of will has for its object a content of consciousness directed to a purpose. The proper subject of criticism is not action as such, but the will content in back of it, so far as it can be determined. The act itself, as an external phenomenon, comes under the science of nature and is subject to the law of causality. Volition, as a peculiar and elementary act of consciousness, comes under the law of purpose. If we apply this to our question, we see that it is possible to judge the act of will of the individual subject as it concerns himself, or to judge a content of will which appears as a rule for the conduct of others. There is no third possibility. Hence when the ethical will to do good is to be realized in a special case, there is no other basis for it except to conduct itself in accordance with just social rules. As the essence of ethics is to submit unconditionally and from conviction to the law of right, it follows that there must be rules of right conduct. And these, as we said before, are embraced in the concept of social norms. And among these social norms again, the legal, on account of their sovereign validity, occupy the first place, merely tolerating the conventional rules as subordinate.

It is clear that we must not think of the law as laid down in the paragraphs of the code. Just law need not at all be recognized by the positive law. In that case the former is identical with that rule which should take the place of the one actually in force. And a contradiction between that norm to which the ethical will should submit and the positive legal statute is indeed possible. But the method of determining how to act justly is in every case that of just law. If any one is not willing to accept this, he must

know a second fundamental method for determining the right norms of conduct. What sort of theory would this other be? The formula combining all the necessary elements is, *To will the legally right from a good motive.*

§ 3. *Just Law an independent problem.* — The first section of this book closed with the question whether the content of just law can not be derived simply from ethical doctrine. Our last discussion shows that the question must be answered necessarily and unconditionally in the negative. A doctrine which aims at the perfection of intention, at the formation of character and the purifying of ideas must follow a different method of investigation and exposition in the solution of its problem from that of a theory whose object it is to indicate when a rule of conduct is just in content. In the former the chief aim is that the person profiting by the education and instruction afforded by the science should himself in every instance create his own right volition, whereas in the case of the content of just law such an aim with respect to those subject to it is not present. The content of a volition which furnishes their purposes to *other* persons for the sake of right agreement bears for this very reason a different character from that state of consciousness which aims at the inner perfection of the subject himself. Accordingly both go back, to be sure, to the same highest law of human volition. But this ultimate law finds its distinct specific applications in the division of problems above indicated. We still have to make this clear for our present question.

It has been thought that two Christians who are truly inspired and permeated by the spirit of Christian teaching can never have a dispute according to *just law*. But this would hold true only if we form an ascetic conception of this teaching, and assume that they not merely despise all finite goods from the point of view of ethical valuation and perfection, but that they carry out this idea directly

in their external activities. We shall have occasion to speak of this in the sequel. Here, however, it is clear, indeed, that if each one of them is ready, in addition to the coat, which might be the matter in dispute, to give his cloak also, — there would be no legal dispute at all. But this merely pushes the question of just law aside, and does not solve the problem inherent in it.

But we have the problem of just law. It is given in the existence of social life, of which we can not get rid. Nay, even if we imagine that some day all people might will in accordance with the principles of unselfish love and sincere devotion to right, still the external rules of co-operation can never be set aside. For they are immediately involved in the existence of life in a community. It is the conceptual element, which alone gives meaning and reality to the idea of activity in co-operative agreement. We maintain therefore not merely that the legal system can hardly be dispensed with because the evil desires of the sons of men will certainly not disappear; but that law is necessary a priori, because it is inevitably implied in the idea of co-operation, which latter is the main object of our entire discussion.

Accordingly no matter how far the ethical perfection of the human race may in the course of time advance, there will always remain the right rule of social life as a specific object of investigation. The technical possibilities, the changing qualities and capabilities, the external conditions of life in the different regions of the world, — all of these offer a peculiar basis for co-operation, which must be regulated. And this regulation forms the object of an independent method and study. A merely technical economy can not be managed directly by the principles of good intention and perfection of character if we are to obtain final results. Our problems are of such a character that we must first master them by means of rules for external conduct. After we have laid the foundation of a

properly regulated external co-operation, we can then raise upon it the structure of good ethical activity.

But even after we have raised this ethical structure, just law still retains its own independent problem. For in establishing our rules for external co-operation we must always consider the *mutuality* of rights and duties. The ethical law knows no such reciprocity. It lays down a standard and an obligation without concerning itself about the guarantee of reciprocity. The ethical command thus isolates the individual to whom it addresses itself. Even though it concerns all people and commands them all alike, still all these commands are merely an aggregation and summation of independent elements. Accordingly there is no ethical duty that is reciprocal and limited to this quality of reciprocity. And it is for the very reason that the ethical law unconditionally obligates the individual and speaks to every one separately, that ethics can have nothing to say concerning the peculiar problem of a law which measures its rules to satisfy mutual relations and upon this basis lays down the right rule of external conduct. The attainment of just law thus remains an independent problem requiring a method of its own.

We may also state the matter more precisely as follows. There are no ethical concerns which regulate the reciprocal relations among men. It is true, indeed, that a morally good intention must also have a constant bearing upon other persons, and that the isolation caused by the moral command must not be thought as a concrete and spatial isolation. But the ethical demand is complete as soon as it fills the subject of its teaching with a right inner intention. The moral teacher requires for his practical work a single individual only; whereas the creator and administrator of just law cannot get away from a right adjustment of a relation between two persons.

In our days the question has emerged with special frequency concerning the relation of *Politics* to *Ethics*.

On the basis of our previous discussion we can decide this question with certainty as follows. *Political questions as such belong to the domain of just law and have no direct relation to ethical doctrine.* In politics we are always concerned with the conduct of persons or communities toward each other, whether we are dealing with the creation of external rules or with their application. If our choice of standards lay exclusively between that of ethical doctrine and brute force, we should have to come to the sad conclusion that the decisive factor for political questions is rude force and selfish desire, and nothing else. But the above alternative is not true. Ethical teaching is only one part of that just volition which stands opposed to brute force. Just law forms its supplement; and the political problem belongs to the latter.

This holds true not only of internal politics and the organization of rights in one's own sphere, but also of foreign relations as exhibited in the contact and treaties of peoples and States. It has been asked and it has been doubted whether it is right to form an external community by the admission of foreign nations; and in what way it is proper to make claims and to recognize one's own obligations as the basis of such a community. All these are questions of just law. For we are here again considering actual or desired co-operation, and are searching for that legal regulation which will make this co-operation possible, and which is implied therein. But legal regulation, as we said before, necessarily aims at justice.

It must not be said that social relations are historical products, growing up wild at first; and that then ethical judgments are applied to them. Social questions are concerned at first with external conduct, *i.e.* they have to do first of all with *moral* considerations, using the word "moral" in its most general application—that use of it which is identical with the aim of just law. When we have considered the latter independently and have found and

adequately established it, then and not till then does ethical theory step in with its command that that which has been recognized as just should receive also our consecrated devotion in truth.

Without the first it is a waste of effort to endeavor to decide problems of just law, so far as the justice of its content is concerned, by means of Christian ethics. And conversely, the criticism is unjust which finds fault with Christian ethics because it does not also contain the principles for right external regulation of conduct. In the measure in which the ethical doctrine of Christianity ignored the question of just law it was enabled to advance the solution of its own peculiar problem with an efficiency and purity that surpassed all expectation.

§ 4. *Ethical doctrine, an independent problem.* — We can get a more precise idea of the function of ethical theory (in the strict sense of the word) by carefully analyzing its fundamental conception as aiming at inner perfection and the formation of good intention. In doing this we need no detailed ethics. Nor need we investigate its fundamental principles or deduce its highest law. Much less does it behoove us to enter into the details of ethical casuistry or investigate the related problem of moral education. And finally, we have nothing to do with the genesis of moral commands in the course of human history. Our concern here is simply this: In what sense can the peculiar problem of ethical theory be properly considered in contradistinction to that of just law?

In reflecting on this independent problem we must first call the reader's attention to the negative aspect of the case. Ethical theory as such must ignore everything which aims merely at the justice of external conduct. All those questions which can be satisfactorily and exhaustively settled by just external action and service concern legal conduct, and have nothing to do with ethics. Jesus gave the correct expression to this idea when he regarded it

outside of the function of his teaching to be a judge or to decide the division of inheritance, and declined to commit himself on the question of the right conduct toward the government demanding the taxes, refusing to say anything in detail concerning "that which was Cæsar's."

It may be that in the case of the founder of the Christian religion this refusal to concern himself with external rules was intended above all for the religious question as such. He meant to indicate that the grace of God, forgiveness of sins, salvation and justification by faith, are different from pre-established rules and exercises of an external character. But the same thing holds true of the moral question with which we are dealing here.

Both are very forcibly brought out in the well-known sayings: "But thou, when thou prayest, enter into thine inner chamber, and having shut thy door, pray to thy Father which is in secret." And again, "But when thou doest alms, let not thy left hand know what thy right hand doeth." This ethic thus separates its problem sharply and distinctly from that of good law. "Ye have heard that it was said to them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment: but I say unto you, that every one who is angry with his brother, shall be in danger of the judgment; Ye have heard that it was said, Thou shalt not commit adultery: but I say unto you, that every one that looketh on a woman to lust after her hath committed adultery with her already in his heart."

Those commands in their external conception were rules of right conduct. This clarifying exhortation aims at meaning and thought. It is a matter of indifference from the latter point of view whether the idea passes into outward action or not. The fault, if it be there, is already in the heart and in the mind. And the object of the new announcement, the purpose of the new command as ethical teaching, was to purify the heart, to remove as far

as possible evil thoughts, and to put in their place sincere thought and a pure will.

To recognize this truth and to carry it out as an independent problem in contradistinction to just law, one need not hold the principles of any definite religious confession. The avowed atheist must also admit the possibility of an ethical question independent of law as well as of religion. It may be formulated as follows: Be in your thinking and willing, in your own innermost life, as if an omniscient being stood before you. Wipe out everything that would signify opposition of being and seeming. Be true to yourself.

If this is to be successfully realized, it is clear that we must have as a basis a systematic outline of an ethical doctrine, such as has so far, by way of introduction, been attempted only in rare and occasional philosophical endeavors. We must however return from this prospective digression to the further exposition of the peculiar problem with which we began.

It is clear that the ultimate aim in our problem (putting all details aside) is to free the ego from all self-interest and, in place thereof, to imbue the will with devotion to universal purposes. As Luther says, "Cursed is all work which does not come from love. Work comes from love when its aim is not one's own pleasure, use, honor, comfort and welfare, but when it comes from the heart and is done for the sake of the use, honor and welfare of others." If the will is to be right, the desire just, the inner endeavor good, ethical doctrine must see to it that the content of the purposes presenting themselves shall be guided and determined by the spirit of freedom — freedom from mere subjective desire. As Natorp well says, "If one regards the object of his own will as his own affair, his will is not purely ethical. It does not purely fulfil its own law so long as he puts his own business in opposition to the business of others. The will becomes ethical only when I

recognize that my business is not, and ought not to be, other than what ought to be, and in truth is, the business of everybody else."

A good deal of precise instruction has been handed down to us to the same effect. We can easily see how the sublime command to love our enemies can form part of a philosophical chain of thought. "Ye have heard that it was said, Thou shalt love thy neighbor, and hate thine enemy: but I say unto you, Love your enemies, and pray for those that persecute you." Right intention requires universality, and this can not be attained except by extirpating all merely subjective desire. But personal dislike and enmity is the very type of this last quality of thought. And on the other hand the idea of a good and loving disposition toward men can not be more universally and absolutely expressed than by embracing one's personal opponents in one's affection.

But there are other expressions that have caused more difficulty. It has often been an object of reflection that Jesus has emphasized in His teaching the standpoint of humility, suffering and renunciation of one's rights. "But I say unto you, Resist not evil: but whosoever smiteth thee on thy right cheek, turn to him the other also. And if any man would go to law with thee, and take away thy coat, let him have thy cloak also. And whosoever shall compel thee to go one mile, go with him twain. Give to him that asketh thee, and from him that would borrow of thee turn not thou away." These expressions have been taken literally, and accordingly asceticism has been regarded as the highest ideal of Christian virtue. Self-humiliation and self-suppression, mortification and torture of one's own person, for others or for the sake of oneself, has been considered Christianity's highest command. A partial attempt has been made to carry out such an ascetic system by force. On the other hand the whole doctrine was rejected as erroneous. Or those expressions were

held to be valid only as inexact paradoxes, opposed by other statements and by the founder's own definite conduct, showing that the ascetic tendency can not be taken as the predominating one, but merely as auxiliary. And furthermore, as there are other passages which preach renunciation and sacrifice (Math. 19, 12; 21), the opinion has been expressed that a difference should be made between an ethical doctrine for ordinary men and one for a narrower circle of chosen persons.

But this problem may perhaps be solved in principle by supposing that the purpose of the teaching in question is not conduct as such, but the right direction of thought exclusively; that the aim of this work is the inner command, "You shall be perfect."

Hence it was not at all the function of those sentences to indicate the right line of demarcation in the mutual activities of men, or the just manner of external co-operation. What one may justifiably demand of another, and what the latter may in turn have a right to require of the former, is a matter that is left undecided. What is given is an ideal direction by which the person may be educated and his thoughts made to ring true. These teachings are not intended as ethical statutes. They do not concern concrete modes of behavior. They merely illustrate in imaginary assumptions the absolute conception of the foundations of character and motive.

The purification of the inner being from all subjective desire can not better be accomplished than by the thought that everything external should be held in light esteem. Trifling matters must not be given the central place in one's thought and volition. Now the only man who can come up to this requirement is he who has come to recognize with the greatest clearness that there is nothing, absolutely nothing in external goods which he can not afford to miss without feeling himself annihilated or oppressed; who has realized with all the force of his

consciousness that in the harmony of his inner life, in the peace of his mind, he is independent of all externalities.

On the other hand, how a person thus trained and matured will determine what is right in his conduct toward others is, as said before, another question, the answer to which must be sought in a separate investigation and analysis. Not merely does ethics, as just said, stand by itself as a problem; it is also independent of all external regulation of conduct in the realization of its task. Therein lies its strength and high worth. Since its exclusive aim is by a rigorous discipline of character to realize a good will and to strengthen the judgment by means of free and whole motives, it can make no difference for the ethical purpose by what order of co-operation it is accompanied. The peculiar content of the ethical endeavor, *viz.* the inner perfection of every single individual, remains the same, whether external legislation is true to its function of making just law or not.

These considerations give rise to further remarks. We shall, however, confine ourselves to one more example. Why was the mite of the poor widow rightly so typical? The answer is, because there was a real sacrifice in the gift that was strongly felt. But considering the sacrifice in itself, it was meritorious only from the ascetic point of view. The greater external pressure which it caused is in the last analysis not the important point. What is true is this, that in the actual giving away of one's entire possessions the motive is clearly reflected. We see without any doubt that the sacrifice was made from a really pure and sincere intention, and not out of any external considerations. In the alms of the poor is seen the true evidence of a pure heart. And it is a model of the good not because it is a sacrifice, but because it flows from a right inner intention.

On the other hand, the question, under what circumstances it is right to give alms; where a gift is an ethical

duty; is not at all answered in the gospel narrative in question, or in any other of its teachings. The gospels give us no method of just law. They give us only one half of the doctrine concerning our life in human society; they teach us sincere devotion to right. All the emphasis is laid exclusively upon the purification of man's inner being. Of outer conduct not a word is said. Where apparently we do find instructions governing external conduct, for example, where the disciples are charged to go out as preaching apostles and are instructed in their behavior, there too there is no determination of the measure of reciprocal justice in conduct. The instructions are confined to the manner of imparting their teaching as a constituent part of the teaching itself, and to the strength of their resolution as evidence of belief in the content of their teaching. In this sense Jesus could say for the sphere of his moral doctrine, "My Kingdom is not of this world," and yet add, "I am a King."

§ 5. *Union in a common progress.* — There lived once upon a time three comb-makers who were apprenticed to the same master. They were the incarnation of gentleness, sociability and patience in their relations among themselves and to others. Never were people more industrious with fewer claims; and they always showed themselves equally willing and obedient and honest. And yet — so says Keller in his charming story — it was all "a bloodless justice." Every one of the three had the same plan of acquiring some day the business of the master for himself. "And when he once became a master, he intended to live as shrewdly and expediently as ever a citizen lived in Seldwyla, to be concerned about nothing which did not promote his prosperity, not to spend a penny, but to gather as many as possible." To carry out this plan, their only passion, they offered themselves up in the service of the master who abused them; every one of them hoping and wishing to oust the other two by gentleness and

justice and unexcelled devotion. And when they learned that there lived in the same street a virtuous elderly maiden with an income of seven hundred florins, they became passionate rivals (while remaining outwardly peaceable and modest) for the hand of the lady, which they considered a profitable match.

Was this right and good? The question is its own answer. But neither would the reverse situation be adequate, namely when a person contents himself with good intention and does not take the trouble to carry out his intention properly in practice. When modern literature speaks of a "party of sympathy," to which the good and those who love their neighbor are bidden to belong, it does not thereby solve the question. This might give us a Crispinade, according to the well-known story. We must know where and how one may properly realize in practice the sympathy which he feels. Justice without love is empty; sympathy without right rule is blind.

The two must be again united. The reason for the separation of just law and ethical doctrine was in order to get a clear notion of the significance and the problems of the two distinct methods; and in order to make it possible for each one of them to follow out its own peculiar plan independently. But they are both concerned with the same subject matter of the voluntary activities of men, and ultimately go back to the same fundamental law, the highest aim of the will.

Hence they can really never contradict each other. So far as each expresses itself consistently and precisely in its statute or doctrine, they must agree; as is always the case when two investigations representing different points of view conform ultimately to the same law.

Nor, finally, do we improve the situation by saying that justice and love stand in reciprocal relation to each other. For our discussion refers to volition and not to phenomena of perception. But in so far as the above expression can

furnish an analogy for volition, it says nothing that lends itself to a deeper elaboration, such as is needed here. What we require is the union of just law and ethical doctrine for a common progress.

This requirement is not indeed free from danger. We must not yield to it to the extent of allowing the law to absorb the ethical precepts and make them its own. This would mean that legal compulsion would make the commands of good inward intention a part of itself — a state of affairs not merely impossible, but absolutely wrong. Luther has already rejected such a proposal in interesting and appropriate phraseology: "Therefore where the temporal powers presume to lay down the law for the soul, they usurp the rule of God, and only succeed in seducing the soul and corrupting it." And from another point of view Kant expresses himself to the same effect: "Woe to the political legislator who aims in his constitution to realize ethical purposes by force, to produce virtuous intuition by legal compulsion! For in this way he will not only effect the very opposite result, but will undermine and endanger his political constitution as well."

The confusion would be just as great if conversely the ethical law should attempt to regulate external duties as if they belonged to its domain and had the character of independent and self-sufficient obligations. The ideal aim of personal perfection can not be realized by means of rules which dictate, in the name of reciprocal justice, the right external conduct of others. Herein lay concealed the fundamental error of Machiavelli when he said: "Hunger and thirst make men industrious, the laws make them good." The truth could not be more radically mistaken.

Justice can not therefore be realized by confusing the content of the two disciplines we have been discussing, but by an offensive and defensive alliance between them. But their union for common progress is also indispensable

for each in the pursuit of its own task if it is to do it adequately. Each has need of the other.

1. *Just law has need of ethical doctrine for its complete realization.* — The determination of what, in a given case, constitutes just law is at first simply a matter of knowledge. But to utilize this knowledge and to carry it out in practice, there is need of a firm, unwavering will which has found its goal and its law in unselfish devotion to right. It is not sufficient to know the right, one must have the enthusiasm to carry it out; and this enthusiasm is furnished by ethics.

This is especially true of those who, by their word and command, have to order and guide the community by law, no matter what sort of men they are whom the specific positive law sets up to do this work. Here we must again distinguish (a) the instruction which determines what in a given case objectively corresponds to just law, and (b) the teaching which should impress upon the official legislator to will the right in effect. The latter alone corresponds to the virtues of the legislator as required by Plato. This may (after the manner of Natorp) be worked out in parallel lines with the individual virtues: *Truth*, as the firm will to know the right; *Courage*, to realize the right in fact with unswerving resolve; *Purity*, to remove from oneself and others everything that smacks of self-interest; and, comprehending them all, *Justice*, to maintain the other three in thought and resolve against third parties.

It follows from this that we need not debate whether justice is an ethical or a legal concept. That depends upon the point of view from which the concept is judged. If we think of it as a virtue of the person who lays down and carries out the law, it pertains to ethics. If, on the other hand, it is applied to the objective content of definite norms, it is a question of just law. In the first case we judge the person of the legislator and the judge, and we

try them as men. The object of our consideration is the sincerity of their intention and the purity of their character. We test the goodness of their mind and will; and hence "*iustitia*" as "*constans et perpetua voluntas ius suum cuique tribuendi*" belongs to the problem of ethical doctrine. But in our consideration of the law we may also abstract from the person of the legislator. What passes as a legal norm may be taken up and considered solely with a view to its content, and the author who created it does not concern us as a person at all. In this case we get to the second question, namely, Is the content of this law justified? Here, too, it is a question of justice, but it is the problem of just law.

And this problem, as we said before, must be worked out by a method of its own. Here, too, it is not possible from the virtues of the legislator directly to deduce the just content of a given law that is in question. But, as we are now trying to prove, just law has need of ethical doctrine for its complete realization. The two must unite and together carry on the fight against injustice.

It may be admitted that at first sight the arguments in favor of this union would seem to be mostly "*argumenta ad hominem*," such as that legal compulsion alone can not maintain order and peace among men, and we must rely also upon the influence of ethical teaching; and other considerations of the same sort. But the necessity of the union above mentioned is also implied in the essence of law itself. Since the latter is in the last analysis an endeavor to compel justice, it follows necessarily that it must accept the support of that teaching which aims at purifying the will of injustice.

We may say then in summing up that in the social question there is something higher than merely just law. Neither the one who lays down the law nor those who are subject to it can afford to limit themselves to a search for justice alone. "The fulfilment of the law is love."

The hope entertained by many statesmen and parties of improving the ills of society and bringing about a good social order by means of a constitution of just laws alone, was foredoomed to disappointment. The legal State is indeed a necessary condition for such a purpose, but by itself it is powerless to attain the desired goal. The idea was better and more truly expressed long ago in the preface to the "Sachsenspiegel."

"I can not in general make people sensible, so I can not teach them the duties of law unless God, the pure, help me."

2. *Ethical doctrine has need of just law for its realization.*—As we said before, ethical teaching addresses itself to the separate individual. The demands of ethics are entirely independent of reciprocal service. It requires perfection of character and motive without regard to whether other persons are equally ready to take upon themselves the ethical duty of purifying their thoughts. But whatever content of human volition ethics embraces, has to do, in its workings, with the relations of man to man and life in common with other people. Accordingly to guide the will and confirm it in goodness is, indeed, a process complete in itself. But if the results of this process are to be realized in practice, we must determine in a second study what a right norm of external conduct is. And right volition is now to be applied to this norm.

People as a rule combine these two considerations into one. There are not many who are penetrating enough to see that in their conscious volitions they follow out two separate methods of thought at the same time. If, for example, a person says, "I owe it to myself in this particular case to do or not to do so and so," there are two considerations involved in his statement. In the first place he makes up his mind what is the right thing to do under the circumstances, implying perhaps that the claim of the other person is unjustified. And in the second place

he declares that what is right in this case must be really willed, and what is unjust must not be recognized. The former is a determination based upon social justice, the latter signifies a resolve to remain firm in willing the good, and not to allow oneself to be misled by influences tending to weaken the will and to turn it away from its pure intention. But these considerations represent in all cases two distinct methods of thought, one of which leads to the content of right conduct and the other to good resolution.

But there is this difference between these two methods. The first is able to furnish of itself a norm that may be carried out in practice. For it tells how a person must conduct himself to act justly. And though, as we said before, its work thus limited remains incomplete, still it is clear that the result is of itself calculated to be carried out in practice.

On the other hand, the result of the second process of thought, which aims at the creation of good intention, has no possibility of immediate practical application. The purpose is to produce the firm will to do the right. But what this right is must be found by the other method of investigation. Ethical doctrine is therefore in danger, in the measure in which it draws the line sharply around its peculiar purpose, *viz.* the ennobling of the inner man, — of remaining suspended between heaven and earth. Its work can perfect the result obtained by the other method, the one dealing with right conduct. But without the latter it can never lead to any practical results.

But we must not content ourselves with a negative attitude. Ethical doctrine must, in accordance with its fundamental idea, strive after a union with the method of just law. From the essence of ethics we draw the legitimate conclusion that it must make the rules of law the subject matter of its realization. It can be shown that the compulsory character of the law is the necessary condition of social uniformity generally, leading as it does to right

regulation of the social life of man. Now it is the business of ethics to unite itself with the concrete consequences of the principles of just law, and to lend to the cold and dry commands of just law the warm and fresh stream of a devoted will and an unchanging resolve to do the right. Ethics must do this or deny her own command of unconditional striving for the good. For ethical doctrine can not find any other sphere for its realization than that conduct which is based upon the rules of just law. In this sense we may cite with approval the following quotation: "Therefore it is necessary to be obedient not only for fear of punishment, but for the sake of one's own conscience."

CHAPTER THREE

JUST LAW AND LAW OF NATURE

§ 1. Law of nature and nature of Law. § 2. Reason as the source of the Law of nature. § 3. Validity of the Law of nature. § 4. The three questions of the philosophy of Law. § 5. The universal standard of Law.

§ 1. *Law of nature and nature of Law.* — The law of nature is a law which corresponds in its content to nature. But what "nature" is meant? Are there not several meanings of the word which may be used as examples? This question is not improper. For in fact there has been great divergence of opinion respecting the problem placed at the head of this section. If we are to have a valid judgment about the "Law of Nature," we must first understand clearly what sense of the word "nature" is here appealed to in order to lay down and justify a law in accordance with it.

The expression "nature" in this connection may be understood in two senses. We may speak of "nature" in opposition to "civilization," and we may use it in the sense of *uniformity* in contradistinction to mere individual instances. It is the second use that must be emphasized here. We also find, indeed, the expression "Law of Nature" used in the sense of that law which may be thought to prevail in a state of nature, *i.e.* outside of the life of human society, and hence outside of civilization, which educates and perfects human capabilities. This use of the expression is especially worked out by Spinoza and was confirmed by others after him, who maintained that

the law of nature is the law of might or the law of the stronger. In this case the word "law" would mean the expression of the natural qualities of an object, and the problem would be one of natural science and not a social problem at all. It is no longer a question of regulating social life, for as thus considered "nature" is opposed to social life. And in this "law of nature" we neither postulate on the one hand a well-founded authority in the sense of being ideally justified, nor is there on the other hand corresponding to this authority of the stronger a natural duty of the weaker to submit.

Passing now from the idea of a state of nature to a state of society, and understanding by "Law of Nature" a law which appears in the natural course of events without deliberate systematic consideration and judgment, we shall designate by the expression in question *positive law as it actually is*; and the opposition between natural and positive law would disappear. We now see that the first sense of the word "nature" does not carry us any further in our present train of thought.

It is true that the "sentimental idyl" demands the return to "nature," as the right mode of human living; and we also speak of an honest and upright person as "natural." But all we mean here is that the specific content of the so-called "civilization" of a given historical period is not right; and that justice is to be found by doing away with certain definite practices which are of that civilization. Or we mean, in the second expression above mentioned, that a given person comes nearer to the ideal requirements in respect of perfection of qualities than the average man of a certain definite kind of civilization. Here therefore the word "nature" is unconsciously used in quite a different sense.

In this second meaning of the expression, "nature" is used as a synonym of *uniform and universal essence*. Now the essence of an object is, according to the good old

formula, the unity of its permanent attributes. Law of Nature would then denote a legal content that does not deal with particular instances as such — these are accidental and not “natural” — but aims at permanent unity and systematic uniformity.

But this concept of “nature” again lends itself to a two-fold understanding. Some maintain that the content of law must correspond to the nature of man, while others hold that it must answer to the nature of law. The first view is that adopted by the writers of the seventeenth century who dealt with this subject. Grotius is the first of that line of thinkers. He goes back to the attributes of human nature, and assumes as the fundamental quality of man (alone among all creatures) the “*appetitus societatis*,” *i.e.* a desire for a quiet and rationally ordered life in common with his fellowmen. To this is added the human gift of going beyond the momentary sensuous desire and recognizing and following the useful. And now we can show *a priori* that a given rule belongs to the Law of Nature, “*si ostendatur alicuius rei convenientia aut disconvenientia necessaria cum natura rationali ac sociali*”; for example, not to do violence to others, who have the natural right of self-defence; or to keep a contract, and so on. This *a priori* proof can be strengthened by an *a posteriori* argument, namely that a given rule of law is recognized and followed as a law of nature by all peoples, or at least by all civilized peoples.

Following the same method as his distinguished predecessor, Hobbes soon comes upon a different path. He regards the fundamental characteristic of human nature as man's fear of man. This fear must exist according to him, for every man desires to harm his neighbor, and the one man may lose his life as easily as the other. Hence the law of this “*status naturae*,” the natural state of the individual man taken by himself (to be understood, however, in the abstract, and not as the statement of a his-

torical fact), is that every man may take all he desires for his preservation; and the characteristic element of this condition is therefore, "*bellum omnium contra omnes.*" But war is opposed to the preservation of man, to which he is driven by nature; hence, "*prima et fundamentalis lex naturae est, quaerendam esse pacem, ubi haberi potest; ubi non potest, quaerenda esse belli auxilia.*"

It is well known that Pufendorf, making an eclectic combination of the two doctrines above indicated, outlined a system of natural duties which gives evidence of his insight into the pitiful inadequacy of the imagined state of nature, and the superiority of "*socialitas.*" But in this sketch of Pufendorf we already see a tendency in the direction of the second interpretation of the word "*nature*" mentioned above, namely the attempt to base legal principles upon the nature of law itself. This appears with even more completeness in Thomasius, the most ingenious teacher of the Law of Nature in Germany. He sets up "*Happiness*" as the principle of human activity and assumes that the happiness of the individual is impossible without general happiness, and conversely the latter is impossible without the happiness of the individual.

Rousseau is the first who separates completely the foundation of the Law of Nature from the conception of the nature of man. The object of his investigation is simply to find the standard of social life according to the idea of law. The originality he exhibits in working out the problem leads him to state it in the manner of the Greek writers on the philosophy of law.

It was in fact a mistake in method to bring in the nature of man in working out the problems of the law of nature. It is impossible to prove that man has definite native qualities for social life and certain a priori impulses guiding his conduct in such life ("*Wirtschaft und Recht,*" § 32). All observations that can be made here are relative

and of comparative universality only. And his purposive life can not be determined in its actual manifestations as governed by universal impulses. On the assumption of such impulses we can never arrive at an absolute and fundamental idea of just social volition.

We can show this by reflecting that we have to do here with the system of social regulation, and in particular of the legal order. This is something quite different from a sum of allegedly independent rules valid for and against the individual as such. We must start from the idea of social co-operation as an object of a special kind, requiring an investigation of its own, and by critical analysis discover the law immanent in it.

Accordingly there are no innate rights of the individual which he brings with him, and which, along with the natural existence of man, belong to him as part of his very nature — rights which, upon his entrance into the sphere of law, he contributes to the common fund as an inviolable good, “inalienable and irrefragable as the stars.”

There is indeed a limit to the “power of the tyrant” and to the objective right of a legal sovereign, no matter who he be, a single individual, a number of individuals, or “the people.” But this limiting power of just law can never be derived and determined from the nature of man, but only from the idea of a legally ordered life in general. There can be no *law of nature* in the former sense of the word, but there may be methodical principles, implied in the *nature of law*.

§ 2. *Reason as the source of the Law of Nature.* — There are two ways in which natural law may be opposed to positive law. And each of these may again be considered from two points of view.

1. *In respect to origin.* (a) The origin of the specific content of a legal rule. Many people have thought that positive law derives its content from history, while the law of nature is created in its concrete aspects by reason,

independently of experience. (b) The reasons for the validity of the two kinds of law. Positive law, it is said, is valid by reason of a definite law-creating act, *i.e.* by State legislature or the usage of custom. The law of nature, on the other hand, they say, is valid irrespective of the specific order of the competent organs.

2. *In respect to content.* (a) The general qualities of the specific content of a legal rule. These depend upon whether a given law has the quality of natural justice (agreement with the nature of right) or not.

(b) The manner of validity of each of the two laws. Positive law raises the claim of sovereign validity for every one whom it subjects to itself. The law of nature has a validity of a different kind. It imposes itself as a doctrine and not as a compulsory system. Its aim is to indicate a standard in the maintenance of which a positive law would correspond to nature. And it possesses no other authority than the conviction that it has succeeded in indicating the right standard. We may exhibit this in the following scheme.

Conception of the Law of Nature		
	genetically	systematically
In its content	created by reason, without reference to experience	as objectively justified law
In its validity	as positive law, independent of human enactment	as an ideal model

The first conception of the difference between natural and positive law above mentioned is quite erroneous in both of its subdivisions. It does injustice to the law of nature, and attributes to it a purpose which is not at all contained in its essential nature and meaning. Its characterizations in both of its subdivisions are merely genetic in character. Its radical error consists in the assumption that the content as well as the validity of the two laws

are of equal value in essence, and that the difference is one of origin. There is a methodical error in this unproved assumption, of which many opponents of the law of nature are guilty. The assumption is not merely unproved; it is unprovable. If we wish to know the true relation which the law of nature bears to positive law, we must view it systematically and not genetically.

This can be shown briefly and clearly by taking up separately each one of the two subdivisions of the genetic classification. We shall first consider the opinion that the law of nature has its origin outside of experience. The truth here is this. The contents of positive and natural law do not come from two distinct spheres. The subject matter is the same for both, the conditions of their origin are the same, and both of them were born in one and the same world. The difference is one of formal value, and a systematic analysis is required to assign these values to the two kinds of law properly.

Every legal rule which has been claimed for the law of nature may at some time become a positive law. The declaration of the rights of man, the desire to work out a constitution of private property, of the freedom of contract and of the right of succession, by the deductions of the advocates of the law of nature, the opposition to capital punishment, and so on — all these are cases which come within legal experience. The assumption to the contrary is quite impossible.

If then the theory of the law of nature is to be discredited because it is based upon reason, the latter must be assumed to be a power which imports empirical matters (in this case concrete legal principles) from a sphere lying outside of reality. How, indeed, reason can do any such thing, and what sort of unknown land it is from which, independently of experience, it is to introduce intelligible ideas, is a matter which remains entirely dark. He who thinks of "reason" as a magic power by which we conjure some-

thing from an unknown sphere into the world of experience has, scientifically speaking, reached a dead-point. For if we think of reason as divorced from all experience, then no man possesses any such magic power. Nor is it true, as some have supposed, that this power of reason arises in every individual "de novo." The idea of a psychic quality of this nature existing in the individual is a chimerical fancy and an obscure word which has no clear meaning. A faculty of reason which stands with one foot in the world of experience and with the other outside, and carries over legal principles from the latter into the former, does not really represent any intelligible idea, no matter how extensive and how fine this fantastic image is conceived to be. Such a faculty could not even (as the opponents of the law of nature have expressed it) "furnish knowledge that is true subjectively but not objectively." For it is no faculty at all and has no reality either subjective or objective.

The matter is quite different if we understand by "reason" the faculty of regulative principles exclusively employed in the working out of empirical subject matter. If we take the term in this sense, there is not the slightest difficulty in conceiving of these rational concepts as carrying out a function of their own and claiming objective truth for their results. Accordingly it will not do to understand the difference between positive and natural law to be that in the one case the content of the legal rules is derived from experience, and in the other is introduced by the reason into the domain of experience from a sphere that is independent thereof. The truth is rather this, that the subject matter of the rules of law is without exception derived from experience; and the difference between the two kinds of law is, that in the one this subject matter is accepted as given without further reflection or determination, whereas in the other it is inserted, as a guiding factor, into the kingdom of purposes as a whole.

The subject matter is gotten from historical experience, and there is no material that is independent thereof. But its empirical origin does not prevent its systematic elaboration; and on the other hand, the endeavor to obtain a systematic insight into this empirical material gives it completeness, and raises the problem of the objective justice of the law. We have good reason therefore for abiding by the advice of Luther, "Therefore written law should remain subject to reason, from which it wells up as from a legal spring; but the letter should not make the reason captive, nor the spring be bound to its streamlets."

§ 3. *The validity of the Law of Nature.* — One reason why the idea of a law of nature has met with such violent opposition is because it presumes to place itself beside or even above the positive law. This would bring about a competition of rivalry, it was thought, which would lead to one of the two ousting the other. To set up both at the same time, the opponents thought, would violate the principle of impenetrability as applied to law.

This leads to the same error which we have just considered. The question of the validity of the law of nature must not be considered in genetic fashion, as if the two kinds of law had the same manner of validity and the difference were merely one of the source of this claim. The true difference is one of the character of their respective validity, and must be considered systematically. Natural law has a different kind of validity from mere positive law. The former aims to be a standard, the latter, a compulsory rule. This is no reason for doubting whether the two systems can both be called law. For the purpose of the law of nature is to become positive law; and, on the other hand, the latter should always agree in content with the former.

But is it not possible that a difficulty may arise from the consideration that unjust positive law may create doubts and questions of conscience and come in conflict

with the idea of justice? Is it not proper to disregard a legal rule when it commands evil and injustice? Or is it the duty of the judge and the official to carry out the laws of the State even though their content be unjust? Is it not written that "we should obey God rather than man"?

Some distinctions must be made here. It is indeed true that every one must endeavor to bring about just law for mankind. It is the especial duty of the legislator always to be on guard to guarantee the necessary progress of just law. And every one who has any influence in enacting and carrying out just law should see to it, so far as is in his power, that the content of positive law should be good. So long, however, as the traditional legal system does not oppose the will to be just, an arbitrary departure from the prescriptions of the positive law can not properly be allowed. For in the words of the Psalmist, "Law must remain law." If, by reason of the injustice of certain legal rules, we were free to disregard them in one case and to follow them again in another, it would mean that instead of a society universally administering the law, we shall have a clan acting arbitrarily. For the essence of law in this case lies in its inviolability, *so long as it is actually in force*. A compulsory command to which we do not bind ourselves, which we apply when we wish to, without guaranteeing its inviolable execution while it remains in force, is an arbitrary force; just as it is an act of arbitrary despotism to violate at will a legal rule which it is intended in general to maintain in force.

Arbitrary compulsion is not calculated to be a proper means for a good social life. What we need for this purpose is the legal norm. To be sure, the legal norm is only a condition for the uniform constitution of the social life of man. But it is also a necessary condition. If there is to be a just social life, the employment of legal regulation is indispensable; and every arbitrary violation thereof is already in principle an injustice. He who denies the

necessary condition of social uniformity in general, or disregards it at will in a given case, makes it impossible at the outset ever to arrive at a proper result in this matter.

Accordingly the change of a law must always be accomplished *by a new law*, whether this new law follow from the principles of the old or whether it is an original creation. And it may happen also in cases of necessity that an unjust law is illegally set aside; that it is removed and replaced by a new legal regulation, flowing from a source which is itself not derived from the law, or is even opposed to the legal system hitherto in force. This means must be used very cautiously. Only when there is absolutely no prospect of attaining just law by means of the traditional historical material, can the question arise, in cases of extreme necessity, of using the extreme means of creating original law. And even then, he who lays down the new law must consider very carefully whether by violating the existing law he is not at the outset weakening the basis of the new law, so that instead of furthering the attainment of right conduct, he is thereby endangering its existence; in which case it is once more better hopefully to stand by the existing law than to take upon oneself the risk of the threatening confusion that is in store. Only "sous des restrictions terribles" is it permitted to have recourse to the possibility of creating new law by violating the old law. But as a theoretical possibility, derived from the concept of the law itself, it can not be denied. All this, however, as well as the precise justification thereof, does not really belong to the topic of our discussion. The reader is referred to another place for the elucidation of this problem ("Wirtschaft und Recht," §§ 86; 90; 96). Here we have to follow out the consequences of the one question only.

"Law must always remain law." This means that a legal rule can be removed only by another law. The latter then takes the place of the former, modifying it

more or less. But to recognize the existing law and at the same time act against it by violating it in a given case, is contradictory. Here there is clearly an illusion when we imagine that we shall get a better result by this means than by holding to the law as long as it has not been replaced by another legal norm. To renounce an alleged benefit in a given case is not so dangerous as to trouble the source which makes a systematic social experience in general possible. Every attempt is bound to be a failure which leaves the judicial or administrative official a loophole out of his technically defined problem and duty. In the very process of deviating from the positive law in favor of a supposedly better result in a given case, he would succumb to the dangerous disease of arbitrary force. He would transgress those limits and conditions which make justice in general possible, and would thus not merely fail to attain the desired justice, but would be instrumental in dealing it a fatal blow. It is possible indeed to conceive of cases actually happening in which the judicial and executive officer of the law finds it hard, nay impossible, to carry out in practice an unjust law. In such a case his first duty is to attempt to free himself from the office with which he is charged. And where such an attempt is made impossible by the law's own decree, there is nothing left for him to do but humbly to submit to the law as it is. For it is an error to suppose that in violating the law in the case in question he is merely doing 'a small injustice for the sake of a greater justice.' A single case of arbitrary disregard of the law destroys its authority and being; and, as we said before, makes the attainment of just law in general impossible.

"It would be cited as a precedent, and serve as an example for many another error spreading in the State. No, it can not be."

The logical error, which finds its exact illustration here, lies in the fact that the contrary opinion assumes un-

consciously as the standard and highest aim of law something different from the principle of just conduct. For if the observance of the existing law is a necessary condition for the realization of this highest principle, and the latter is destroyed in its essence by arbitrary deviation in special cases, it is clear that he who is of the opinion that the arbitrary violation of law (*i.e.* such as does not lead to new law) may be justified, must appeal to an ultimate aim of social life that is different from the mere justice of its content. But there is no such other superior principle.

Here, too, we must avoid the erroneous assumption that it may be a moral duty to violate the law at will in special cases. For moral duty aims to form and maintain the intention always to will the right. But in our case the question is what this right, which it is a duty to carry out, is in content. We are considering right conduct. This must be determined by a distinct method; although, as was said before, it can never contradict that doctrine which aims to produce morally good intention, since both of them, though in different ways, go back to the same highest law of the will. This harmony can be established in our case by striving legally to produce just law, "in peace with those who are at peace." The aim of just law can never be attained by a continual bending and breaking of this law that actually is, and is intended to continue, in force. Hence there can be no moral duty to do this improper thing.

The expression quoted above from the Acts of the Apostles by way of objection is not really, but only apparently, in disagreement with our conclusions. What we learn from that saying concerning the relation of positive and ethical law is merely that the conviction of what constitutes right can not be gained by statutory command; and that in acknowledging what one understands to be good he must not allow himself to be affected by the laws. Conviction is the result of a theoretical process of thought,

which is brought about by rational arguments and not by authoritative command; and the acknowledgment of the right denotes the manifestation of inner intention, the love of truth, which can neither gain nor lose anything from external authority. But it does not at all follow from this that the person under the law is justified in setting aside an unjust legal rule by arbitrarily violating it. The command says, "Will the right, with good intention." Now since law is the necessary condition of right, it must be maintained as such. Assuming that one of its consequences in a particular case is untenable, still legal regulation must be respected and tolerated as the general presupposition of the good. Otherwise the laws, in the eloquent words of Socrates, would come up to the man who desires to evade their effects by violating them, and standing in his way so that he can not pass, would ask him as follows: "Are you going by an act of yours to overturn us — the laws and the whole State, as far as in you lies? Do you imagine that a State can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and overthrown by individuals?"

§ 4. *The three questions of the philosophy of Law.* — There are three problems in legal science, all of which have the quality in common that they can not be solved by the consideration merely of definite historical law. They are the following.

1. *What is law?* What universal concept must necessarily be at the basis of an investigation in order that the latter may properly be called legal?

2. *The rationale of the binding force of law.* How is it that every legal command, no matter what its content, has the right, merely because it is "legal," to demand obedience?

3. *When is the content of a rule of law objectively justified?* What highest principle must the legal legislator obey in order that his laws may be just?

The concept of law can not be derived from an analytical consideration of legal rules; for whenever we classify a "legal" experience with other rules of the same kind, we already presuppose that it comes under the concept of law. The precise question therefore is this, By what fundamental synthetic method do we determine that a particular mode of external regulation within social (not legal) experience is to be characterized as a legal norm? If it is thus true that we must go beyond the sphere of technical legal science in determining the concept of law, it is self-evident that this must be the case in the answer to the second and third of the above questions.

The peculiarity of all previous legal philosophy has been that it attempted to solve all the three problems above mentioned by means of one formula. This characteristic applies also to the theories of the advocates of the Law of Nature. This can be seen most clearly in the system of the great Rousseau. As is well known, his idea of law is comprehended in the "contrat social." His formula reads that every member of a community must submit to the whole, under the superior guidance of the "volonté générale"; the latter signifying the advancement of human welfare. This formula is not an account of the origin of law in the history of man, but a simultaneous answer to all our three systematic questions. A community which answers to the "contrat social" is a "legal" community; it is justified in employing "force"; and the "content" of its laws is just.

We note here in the first place the combination of the first and the third problem; and we again call attention to the fact that the question, "What is law?" is answered by pointing to a specific content of social rules.

In a thoroughly scientific exposition of Rousseau, Haymann has recently called proper attention to the fact that a legal positivist can have nothing to say against this claim of the Law of Nature as made by Rousseau. For

if he says that this determination of the legal concept is untrue because it does not agree with positive law, the answer would be that the nature of positive "law" is the very question in dispute. Our opponent might reply that the question is to be determined by a reference to what has actually been realized; from which it would follow that a social command has the attribute of a "legal" rule, only when it represents a successful attempt to determine human purposeful conduct according to the content of the command. But this reply is unsatisfactory, because it opposes the assertion of Rousseau by an assertion of its own. It does not prove that it is scientifically inadmissible to define the concept of "legal" regulation by reference to a specific content of actual rules.

The latter conclusion follows only when we regard the concept of law as part of the social concept, as being involved in the experience of social life. Here the concept of law appears as one of the conditions regulating social life; and accordingly is nothing more than a peculiar quality of norms laid down by man. Legal regulation is therefore a sub-species of social regulation generally; and the concept of law must be defined as subordinate, and as nothing more than a special subdivision of the formal conditions of social life. The specific content of the social life is so far not to be considered.

The same criticism applies to those recent attempts of legal theory which regard law as the unanimous "recognition" of norms existing in a social group; or as the "universal will"; or the "general conviction," and so on. Everywhere we see the same endeavor to express the concept, the compulsory character, and the content of law in one and the same general formula. This, as we have just shown, will not do. Every one of the three problems must be solved by a distinct method of its own. To be sure, we must also seek to find unity among them; but this can not be done by mixing them in an external formula.

The theory here criticized has found advocates in many disciples of Thomism. The writers of this school vary considerably in the problem of the law of nature. The fundamental method alone of the famous Scholastic is common to them all. In the application of his theory to social life they differ widely. Some of them adopt the teachings of Thomas Aquinas in a modernized form. Others modify his conceptions in an original manner, differing more or less from St. Thomas and among themselves. And there are some even who agree fundamentally with the view here advocated. Among those belonging to the second of these three Thomistic groups is a theory that has been defended with great energy, namely that there can not be such a thing as unjust law; and that statutes opposed to the law of nature do not possess the character of laws. "Unjust laws," says Cathrein, "are called laws or legal norms in the same sense in which we speak of counterfeit gold, of the pseudo-Demetrius, or of a false friend. They have certain external forms of law but not the essential inner content thereof, like empty nuts."

These analogies of the ingenious writer are not convincing. All expressions of the human will may, so far as their content is concerned, be divided into right and wrong. But this division has nothing to do with the formal classification of social volition into conventional, legal, and arbitrary. As the distinction between right and wrong may be applied to the content of every one of these three classes, this distinction can not at the same time be the criterion for the classification itself. And conversely, as soon as we have defined our three classes severally in a universal manner by means of formal criteria, the content of each class thus conceptually determined may be right or wrong. It follows therefore that a social ordinance may belong conceptually to the class of legal norms, and yet be in content unjust. The concept of law is not

contradicted as such by a social norm which commands polygamy, burning of widows, slavery, and the exposure of weakly children. A "false friend" is really a contradiction in terms, like a "triangular circle." But there can very well be an unjust judge, just as a sick or criminal person still comes under the concept "man." Conceptually a sermon belongs to a different class of speech from a political oration. But who will say that there can not also be, so far as their content goes, bad sermons?

The concept of law must be determined by getting an idea of the other elements in social experience which are contrasted with it. These are, as we said before, the *conventional* rules and the *arbitrary* commands. Viewing law in this relation, it would be a contradiction to speak of "a law which may be violated at will" or of "a law which does not demand obedience," because this would confuse the conceptual boundary line between law and the other two classes of social regulation. But the idea of a law whose content is unjust does not contain any logical contradiction.

We have now brought out the first fundamental difference between the theory of just law and the doctrines of the law of nature. The former concerns itself merely with the method of determining when the content of a specific law is just; whereas the latter exhaust their efforts in the vain attempt to determine in one and the same investigation both the concept and the compulsory character of the law. But there is another difference between the two theories, more profound and more radical in its significance.

§ 5. *The universal standard of Law.* — The various theories of the law of nature all undertake by their own method of argument to outline an ideal legal code whose content shall be unchangeable and absolutely valid. Our purpose, on the other hand, is to find merely a universally valid formal method, by means of which the necessarily

changing material of empirically conditioned legal rules may be so worked out, judged, and determined that it shall have the quality of objective justice.

The attempt of the law of nature was foredoomed to failure. For the content of law has to do with the regulation of human social life, which aims to satisfy human wants. But everything that has reference to human wants and to the manner of satisfying them is merely empirical and subject to constant change. There is not a single rule of law whose positive content can be fixed a priori. The proof of this statement is found in another connection ("Wirtschaft und Recht," § 32). Against this Cathrein has recently maintained that the principle, "Give every one his due," is a rule of law with a positive content, which is a priori and universal. Now we know that the principle, "*sum cuique tribuere*", was actually regarded by the Romans as the fixed attribute of "*iustitia*" (D. I, 1, 10 pr.), and they were right. This principle may signify two things. In the first place it denotes the firm will faithfully to observe the existing law and refrain from arbitrarily violating it. In the second place it may signify the permanent resolve by means of the law to aid every one in obtaining "his due," as the fundamental idea of law demands. In either case we have a fundamental idea which accompanies a specific legal content; but taken by itself it does not represent a positive content of law.

The idea of method is opposed to that of a particular incident. A method is a process which aims at the whole. It is the sum total of rules by which a certain material of knowledge or volition is determined and judged fundamentally and with a view to comprehending it as a unit. Without such a fixed method we should merely have a confusion of particular cases. The important thing in science is to bring the isolated instances into a proper order. This is what systematic conception means. Ac-

cordingly it follows that the idea of methodical insight means to view every single fact as a member of an absolute whole. The word "method" is sometimes also used in the sense of a process aiming at a technically limited purpose. But we must remember in this case that this is a limited use of the term for a special purpose. For as the special object of a technically limited work is again a particular instance, the specific process employed in working it out must find its justification in the absolutely valid method which aims at the whole, and of which the process in question forms a part.

The error of the law of nature lay in the fact that it claimed absolute validity not merely for the method, but also for the material worked up by that method. The fundamental characteristic of concrete legal rules with positive content is that their content is specific material. This peculiarity distinguishes them from principles of method. In a concrete rule of law the specific character of the empirical material is the essential thing; whereas the characteristic of a methodical principle is that it has no such concrete material. Therefore there is in the study of law a universal method, but there are no concrete legal rules whose content is absolutely valid.

The distinction between method according to fundamental principles and particularity of material must therefore not be confused with the difference between abstract doctrines and concrete situations. The former are sometimes also loosely called theories. Thus we find for example such statements as, that the decision between free trade and protective tariff must not be made according to "abstract theories," but according to "the specific conditions obtaining in a given land." Or the regulation that the legal status of land must be registered in a public book of records is regarded as a "principle," and it is debated whether the legislator may or may not draw therefrom further consequences concerning, for example,

the legal situation of the lessee. Roman law, it is said also, based the question of liability for damages upon the "principle" of fault. And there are "theories" of the municipality, market, guild, and so on in the history of the German cities.

In such expressions as these distinctions are made within the results of concretely worked up material. The question in these cases is whether these results can be completely embraced in a formula filled with concrete material.

Our investigation, on the other hand, has to do with quite a different distinction. Here we are concerned with a universal method as such, which must be considered as an independent object of inquiry, and which has nothing to do with any specific content of particular cases that may be worked up in accordance with this method. Only in this way do we really get a universal legal standard. We must investigate the method in the sense of a formal process and an absolute system. For only in this way is it at all possible to have a proper definition and determination of particular facts.

We must admit that a systematic and universal view of law may also undergo change and progress. And experience tells of many differences of opinion concerning the absolutely valid method of just legal content. Nevertheless the aim of the investigation is to find something absolute. Absolute validity pertains not to the possession, but to the claim. Our problem is therefore to lay down in a formal method that which is absolutely valid and which makes particular systematic theories possible.

We are not deterred by the inevitable relativity of all volition and thought. Our purpose is to master the historically given material, and to control and arrange in systematic order the never-ending change, which would otherwise be a chaotic movement. In seeking to master this material we must not reduce it to lifeless rigidity. So long as we are dealing with specific material, improvement

is always possible in its control and arrangement; and the process is never finished or valid for all time. But the thing we are looking for is the process of arranging; and this is a method of absolute validity. It is not at all affected by the changeable material of historical facts; for method as such has nothing to do with material.

CHAPTER FOUR

JUST LAW AND GRACE

§ 1. Grace in the Law. § 2. Grace in the uncertainty of positive Law. § 3. Grace as correction of positive Law. § 4. Innate Law. § 5. Mercy superior to Justice.

§ 1. *Grace in the Law.* — A traveller found on his return trip that the return ticket, which was paid for, was not in his pocket. Thinking he had lost it, he purchased another ticket one way. After a certain length of time he found the old return ticket in a side pocket of his overcoat, and asked the management of the railroad whether he was not entitled to some reimbursement. The answer was that according to the regulations he should have informed the authorities at once of his loss, and retained also the newly purchased ticket. Not having complied with these requirements, he had legally no claim. But as a special favor he would have the price of the second ticket returned to him. Was this an act of grace, or was it in conformity with just law? What relation do these two concepts bear to each other? How far does each one retain its own *raison d'être*?

The institution of grace is usually in close connection with the criminal law, in the exercise of which it plays a very important rôle. But it may naturally be applied in the other parts of the law as well; not least in the domain of the civil law. It was a just remark, already made by the older Pandectists, that the "*in integrum restitutio*" of the Roman law is essentially the same as the mercy of the court to a condemned criminal. And the only difference is that restitution of the original status restores

one's status in private law, whereas the mercy of the court in the case above mentioned belongs to public law.

In all cases of grace or mercy we are dealing with a special act of one who is legally authorized thereto. The act may be expressed in legal form, as for example, the law of amnesty. But usually it is a special act concerning a particular case, consisting of the renunciation of his rights on the part of the legally interested party, or it is an act of a public legal organ. For these last named cases it has been rightly suggested to regard it as a public juristic act.

An act of grace always does a favor and a kindness to a particular person who would otherwise have to bear certain disadvantageous legal consequences. In such cases other persons do indeed suffer by reason of the act of favor. Thus the party who voluntarily renounces his legal right as a matter of favor; or the opponent, in the case of "*restitutio in integrum*" granted by the praetor; or the community, in case of a pardon granted to a guilty party -- all these suffer disadvantages by reason of the act. But the practical strength of the idea of grace is that it aims at alleviating the burdensome pressure of the law. In the time of the Franks there had developed such a thing as the withdrawal of the "King's grace." This signified the breaking off of all personal relations to the court, as well as the loss of everything in the shape of offices and goods which the disgraced person had received from the King. But this had nothing to do with the aims of the law of grace which we are considering now. So far as this Frankish institution was regarded as a means of legal security or even as a mode of punishment, it represents a strange mode of laying down the law and of officially carrying it out.

The doctrine of grace in the law involves two questions:

1. The preliminary technical question, namely, what are the cases in which grace is allowed on the basis of a

definite law, and who is the person or authority legally competent to exercise this privilege?

2. The principal question, what is the principle that determines the inner justification of conceiving and carrying out an act of grace? The first question is treated fully in technical legal science. The second comes more properly within the scope of our investigation.

Here we must lay down the fundamental principle, to start with, that an act of grace in legal matters must not be exercised in subjective fashion as a matter of personal humor and arbitrary impulse. Acts of grace are properly subject to objective criticism. And it will not do to reply in the autocratic manner of Charles VIII, "*Tel est notre plaisir.*" The problem of right exercise applies also to the institution of grace. This is not affected by the curiosities of social history. The spectators in a Roman circus could decide as accidental humor suggested to save the life of a wounded gladiator. The medieval bailiff had the power to save at will the neck of every tenth man of those condemned to death. But a law of grace that is worthy of serious consideration is not to be found in such aberrations.

This fundamental conception must have been recognized in general by all writers on the law of grace, and they all agree on this subject. They differ only in matters of detail. Some regard "justice" or "equity" as the principle of grace, calling it also, in a bold figure, a "safety valve" of the law. Others regard "love," "good-will," "kindness" as the principle; while others again hold that the principle is "policy" or "political expediency." But these are merely so many catchwords used in connection with technical legal inquiries as preliminaries to the systematic discussion of the problem. Nevertheless they all have this thought in common that it is better to bring about justice than to follow the strict letter of the positive law; and they give expression to this idea by emphasizing

this or that factor which is especially felt in the actual exercise of grace.

We are not now interested in the further question whether the principle requiring an act of grace to have objective justification is accurately expressed by any of the formulae above mentioned. It is sufficient to call attention to the fact that they all endeavor to express the idea that legal acts of grace must also have the quality of justice. But there arises the question, what is the precise relation of grace to just law? We can make this clear by a systematic presentation of two various ways of applying the fundamental principle that justice be observed in the exercise of grace.

§ 2. *Grace in the uncertainty of positive Law.* — The first illustration of the aim of grace just discussed can be seen in those cases in which the consequences arising from the positive law are doubtful in their derivation even according to the positive law itself. This may be due to the circumstance that the facts of the case in question are not clearly determined, especially in case of circumstantial evidence. But the difficulty may arise also from an uncertainty of the real meaning of the legal rules which have been applied in a given case.

Let us suppose a case ready for decision after trial. The competent organ of the law must give a definite and unhesitating decision, even though it is not blind to the fact that the ground of the judgment is uncertain. The necessity of a firm decision can not be denied. It is expressly stated in the Code Civil, 4: "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." Here is room for grace.

Under what conditions grace may be used, must be determined, as just said, from the law itself. And this question of technical legal science does not pertain to our present problem. But the moment it is clear that the law

permits the exercise of grace, the proper line of judgment is as follows: A consequence which is not *certainly* demanded by the positive law, and the realization of which can not, from another better point of view, be justified, must be avoided. Or, stating the matter positively, right exercise of grace means: to leave open, by means of appropriate regulation, the possibility of improvement, according to the spirit of the positive law itself.

The idea is simple and needs no further discussion. The reader will at once think of the example of mercy or pardon in a death sentence based upon evidence not altogether free from doubt. Here the right of pardon is so well-founded and indispensable as an institution, that the theoretical opposition raised against it by many authors of the eighteenth century, including even Kant, can only be explained historically by the frequent abuse of a power holding itself aloof from all considerations of justice. The evil traditions of the arbitrariness of the law in those days have remained to this day everywhere as an obstacle, preventing men in public life from applying an objective standard to their acts.

Using such an objective standard we must commend the prescription of our laws, according to which a death penalty is not to be carried out until the head of the State has decided not to make any use of his right of pardon. Here the positive law itself decides in general that grace should be considered. It is a legal duty here, whereas in most instances the question of grace, in cases positively admitting of such, is no longer a matter of external rule.

When we speak, however, of "*grace before law*," we do not mean the application of grace so far discussed. The concept and function of grace are not mainly concerned with the consequences of an uncertain law; they have to do rather with the correction of certain consequences of the positive law, demanded by the latter without any doubt. The exercise of grace described so far has

to do with the exact carrying out of positive law as such. Its connection with "just law" is therefore only indirect. The second function of grace is different and forms the subject of the next chapter.

§ 3. *Grace as correction of Positive Law.* — We sometimes use the word "grace" or "mercy" in the sense of a norm of right conduct, as opposed to action that is purely, arbitrary and has nothing to do with positive law. Thus in the Russian fable, where the wolf has the hare in his grasp with the intention of devouring it the next day, unless perhaps he may have "mercy" on it; or when the traveller entreats the robber in the name of "mercy" to spare his life — in these cases the word "mercy" or "grace" is carried over to a foreign sphere.

Arbitrary force is here presupposed as conceptually opposed to legal order ("Wirtschaft und Recht," § 86). The content of the former is always unjust. As the party in power does not intend to bind himself by his compulsory command, such an order, purely subjective in its binding force, can not at all be regarded as a norm of objectively valid content. An appeal to mercy as against arbitrary force means nothing more than an entreaty that the despot renounce his act of violence.

Law, on the other hand, may, in its content, be just as well unjust. This is made possible by the fact that it is a universal command reciprocal in its binding force. Therefore we can have recourse to grace in reference only to the one part of the law, namely, that in which the content is unjust. This must be carefully remembered. We must carefully avoid the idea that grace means simply concession and nothing more, a sort of vague idea of benevolent kindness, which is simply pity and nothing else. This is an illusion.

This illusion can not be justified by a comparison with divine grace. For the latter too, as religion teaches, is intended to help man to attain a right will. The only

difference is that divine grace is always present, can always be obtained by an unconditional devotion to the good, and can never be lost. It is at first far from the man who has an unrighteous will. It must be won in the search for right. Whether we understand it, in the sense of the Old Testament, as the removal of the consequences of sin as a result of the external justice of the person, or, according to the teaching of Paul, as an act of mercy due to a man's complete inner devotion to the divine infinite, — in either case the idea is present that regret and penitence remove the justification of that punishment which, according to law, the man deserved.

Our problem has to do with external conduct. The persons concerned are of absolutely equal rank. What is given to the one must be taken away from the other. To perform an act of grace without reflection, to be carried away by a momentary impulse, which takes account of one suppliant only, would be plain injustice and nothing else. It follows therefore that that grace which we set up as a demand in opposition to positive law, can have no other aim, if it is to be justified, than to effect just law. It is a direct and specific instrument in the service of just law. Its function is, in appropriate circumstances and in a specific direction, to bring about a state of affairs which corresponds to just law.

The relation of just law and grace is therefore this, that both aim at the same result. Leaving out of consideration that use of grace in which it is intended to help us out of a difficulty arising from the uncertainty of the positive law, we must regard this institution as a specific means for just law. And the next question is therefore, what is the general characteristic of acts of grace by which they are distinguished from ordinary exercise of just law — not in the interest of formal competence and technical legal construction (in legislation, for example, acts in the law, etc.), but with the purpose of discerning the real

value of the characteristic method which leads to just law.

Before we undertake to answer this question, we may be permitted to call attention to some of the material which may help us in our judgment. An interesting observation from the technical point of view shows that the effort is constantly growing to separate the judicial activity from the grace-bestowing power, and to assign these two functions to two separate organs. Of the Roman popular courts Mommsen says that they were essentially "courts of discretion." "The laws which are binding upon the criminal judge are not binding upon the sovereign body of citizens. Every one for his part, and hence the majority, is free to allow justice to take its course or to remit the punishment of the condemned." And it is well known from the old German judicial procedure that a person charged with a crime could make a voluntary confession and throw himself upon the mercy of the court (a practice originating in the ancient law of pardon, doing away with the amount to be paid as well as the consent of the plaintiff).

In the course of a long and hard-fought development the separation above mentioned was gradually carried through. But it is hard to maintain it. It is reported, with increasing frequency, of our Western neighbors, a people with an excellent system of justice, that their courts of law acquit defendants who find it necessary, under pressure of need, to transgress the law in behalf of themselves or of their children, even though there was no condition of necessity according to the strict letter of the criminal law. And we know that the jury courts in many places have shown again and again a tendency to avoid the roundabout way of first maintaining the positive law by a verdict of condemnation, and then bringing about a pardon by means of another organ. One reason probably is the unpleasant feeling that they are forced to hand

down an unjust verdict without being sure that it will later be corrected. That this causes confusion in the order of technical procedure is evident enough, and there is little to be gained by entering into a discussion of the matter. But the advantage of calling attention to these facts is that we see here clearly the strong endeavor to obtain just results, and are thus enabled to find an objective justification of the institution of grace as a means of just law, in contradistinction to the merely positive rule.

We are not therefore concerned here with the dispute concerning the justification of the right of amnesty. For the right of the ruling power to quash proceedings which are "sub judice" can be denied on principle only by maintaining the absolute separation of the judicial and executive powers of the government as an a priori legal principle. But as this latter can not be well maintained, we can not see why a better result can not sometimes be obtained by putting a stop to a criminal lawsuit in a special case than by the saying of Ferdinand I, "Fiat justitia et pereat mundus!"

In the other legal branches outside of the criminal law, it is not even now insisted that grace must correct a legal judicial decision. In those cases in which the existing law allows the introduction of grace, the application of it is in order wherever there is occasion for improving the consequences which would ordinarily follow from the positive law. There is an interesting legal case in the responsa of Papinian (D. XXXIX, 2, 86 pr.) which we shall quote here.

"Pannonius Avitus cum in Cilicia procuraret heres institutus ante vita decesserat, quam heredem se institutum cognosceret. Quia bonorum possessionem, quam procurator eius petierat, heredes Aviti ratam habere non potuerant, ex persona defuncti restitutionem in integrum implorabant, quae *stricto iure* non competit, quia intra diem aditionis Avitus obisset. Divum tamen Pium contra

constituisse Maecianus libro quaestionum refert, in eo qui legationis causa Romae erat et filium, qui matris delatam possessionem absens amiserat, sine respectu eius distinctionis restitutionem locum habere. Quod et hic *humanitatis gratia* optinendum est."

The granting of a "restitutio in integrum" in order to avoid the disadvantageous consequences of the positive law was, as said before, an act of grace. It grew up in the judicial administration of the praetors and later became a fixed institution, within positive limits, of Roman law. The limits were "laesio" and "iusta causa." The presence of both conditions was necessary for the consideration of grace. Now the main incident in the passage above quoted shows that the two conditions may be present, but without being united in the same person. The deceased Avitus would have had a "iusta causa" by reason of his absence on public business. But as the time limit for ratification was, at the time of his death, still running, there was no disadvantage for him in the law. On the other hand his heirs did suffer disadvantage. As no petition had been made in their behalf for "bonorum possessio," they could not ratify it. But the other condition was absent in their case. They had not that justifying reason which the testator had in his excusable absence. As far as the technical legal aspects of the case are concerned, the matter is thus settled. "Restitutio" as a matter of grace is not allowed.

Papinian decides differently. He cites an analogy, which is, however, not clearly handed down in our text. But the general sense is plain enough. The only point that is not clear is, what is the common element in the two cases which gives rise to the general concept for the similar decision? Many interpretations have been given to answer this question. Marezoll sees the similarity of the two cases simply in the fact that in both the "restitutio in integrum" was not granted "ex persona defuncti." On

the other hand the decision of Papinian, he thinks, is intended by him to apply only to the specific case cited; and he indicates this in a peculiar way by referring to "humanitas" as the deciding factor. Vangerow finds the common feature to consist in the "*absentia reipublicae*." Windscheid goes further and finds the similarity in the help that is given on the ground of "fairness" to the heirs of an heir.

In these and in many other explanatory attempts the purpose of their authors was to derive from the decision of Antoninus Pius and the *responsa* of Papinian a positive legal rule. The statements of these Roman jurists had been endowed with legal force; and the jurisprudence of that time required technically formed rules. There is no doubt that the original conception as well as the inner significance of the achievements of the classical Roman jurists had to suffer. It was a parallel to "Pegasus in Harness."

The judgments in the fragment from the sources above cited indicate rather that according to their conception the positive conditions under which "*restitutio*" may be granted by an act of grace are also subject to the test of objective justice. The highest principle made use of is taken from the essence of law, and consists of the concept of justice, which Papinian renders here by the word "humanitas." Its utilization was due to the genial intuition of the classical jurists, and we shall have occasion to deal with it more thoroughly in the sequel.

Accordingly the particular conclusion which has been drawn from the idea of just law for the particular case, resulting from an accidental concurrence of circumstances, can scarcely be made into a fixed rule of law to be treated in merely technical fashion. On the other hand the conditions under which it is permissible to look for just law outside of the strict positive rule are positive in their nature. And whether Antoninus Pius and Papinian inter-

preted their positive laws correctly, *i.e.* whether the “*lex lata*” really permitted such free and wide extension as they gave it — for this the responsibility must remain their own. But, finally, it remains our own problem, how the objective result handed down by tradition is to be derived methodically and justified by conclusive reasons.

The institution of “*restitutio in integrum*” is applied in our modern civil law not at all, and in our judicial procedure very rarely. But the tendency lying at the basis of that institution is found in varied application of acts of grace in dispensations, legitimations, change of name, privileged grants and, in some legal systems, in moratoria and indulgences. And in certain connections there comes up also the question of making good the loss suffered by delay or failure to act at the proper time.

The case cited at the head of this section also belongs here. Just law is here realized by a voluntary act of the contracting party. And there are many similar cases where a legitimate right was not claimed at the time prescribed by the regulations, as for example in a recent case where strangely enough a party failed to draw promptly the amount won in a great lottery. On the other hand in the case of conditional “acts in the law” or such as have not been executed, the highest administrative authorities have been empowered to return the stamp that had already been affixed by the notary who drew up the document. The enactment says, “on the ground of fairness.” It is just law carried out by an act of grace. But we must return from these particular historical cases to our systematic investigation.

§ 4. *Innate Law*. — We are familiar now with two problems of grace in the law: The exercise of grace by reason of the uncertainty that exists in determining the consequence which follows from positive law, and the exercise of grace as a correction of merely positive law.

To these may be added two other modes of application: grace due to the uncertainty, or for the purpose of correcting the consequences, of a just law.

1. The last, namely, the correction of the just, seems to be a contradiction in terms, but it is not. It can be justified by referring to the necessary change to which a just legal content is subject. That which was once perfectly justified may, by reason of changes in the subject matter of our judgment, cease to be so later. Here we must be careful to avoid the error of the advocates of the law of nature. The latter assumed, as we know, an absolutely just law, concrete, to be sure, and yet unchangeable and absolutely valid in content. A legal consequence in harmony with such absolutely valid rules can naturally never lose its validity and justification. And hence the students of the Canon Law who followed that theory found it very difficult to justify the dispensations and the privileges granted by the Church. They had to make a distinction between the immutable "*ius naturale*" and the changeable particular prescriptions, "*quas lex aeterna non sancit, sed posteriorum diligentia ratione utilitatis invenit, non ad salutem principaliter optinendam, sed ad eam tutius muniendam.*" The latter also represent in general what is right so far as their teaching is concerned, but in particular cases they may not seem appropriate in their practical consequences, and hence may be modified in the direction of justice by the acts of grace of competent authorities of the Church. In this sense Ivo of Chartres says: "*In his, quibus observatis salus acquiritur, vel in quibus neglectis mors indubitata consequitur, nulla est admittenda dispensatio, sed ita sunt omnia mandata vel interdicta servanda, sicut sunt aeterna lege sancita. In his vero, quae propter rigorem disciplinae vel muniendam salutem posteriorum sanxit diligentia, si honesta vel utilis sequatur compensatio, potest praecedere auctoritate praesidentium diligenter deliberata dispensatio.*"

The underlying opinion that is here implied of an unchangeable concrete legal content is erroneous, as we have shown in the preceding section. To use our former expression, there is only a law of nature with changing content. There are no specific legal norms whose command is absolutely valid, though it may be objectively just. The conceptual difference between the just and its opposite is absolutely fixed; and the formal method of realizing it in practice is of absolute significance. But the material subject to these conceptions and the specific results determined by them are subject to necessary and inevitable change.

We have here then another problem in the exercise of grace. Its function is to correct, *i.e.* to convert into a just legal result, a consequence which at one time was objectively justified but which in the course of time became unjust. In other words, grace must do its part, as far as practicable, to see to it that "reason" does not become "nonsense." Here two things are possible.

(a) The working of grace is chronologically posterior, *i.e.* it steps in when just law has already become unjust. This is true in cases of amnesty. Punishment is the correction of a violation of the law, which says beforehand to every one subject to it: Give yourself no pains to interfere with the law or to transgress it; for everything will be readjusted, whether it be in the form of liberal reparation or of some other substitute therefor. Now in a given case correction by punishment actually took place, and it was right that it did take place. But now, as a result of changed circumstances (a change, for example, in the person of the delinquent, or in political conditions), the continuation of the punishment has no longer any sense. What was formerly right is no longer so, and the correction takes place by an act of amnesty or the granting of a pardon. We must not at this time raise any difficulties about the manner in which this is to be proved. For this

would be anticipating, and would destroy the sequence of our investigation.

(b) The exercise of grace may take place, with the same purpose, *before* the consequences of the existing just law have been completely carried out. Here our calculation is that the law now just may lose this quality later. We can not be certain of it, to be sure; but the possibility must not be lost sight of. In such a case one would hesitate to bring about an irreparable result without permitting a subsequent correction; or (in a different case) one would be reluctant to deprive a person completely of ever petitioning for reparation, when there is hope that he may, in the course of time, be able to make good.

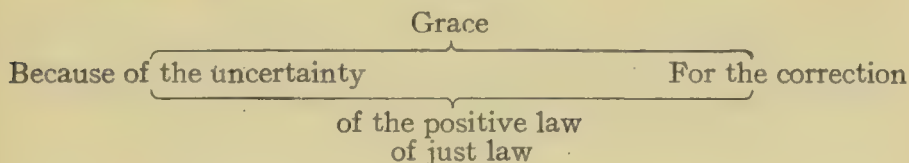
2. Every investigation which has to do with the administration of justice must consider that the possibility of error respecting what is just opens a wide field for the right application of grace. No matter how painstaking and well-intentioned one may be, it is always possible that a thing regarded as just turns out to be the result of an insufficient understanding of what justice is. It may be that the error was concerning the aim of just law or its fundamental method and application in a given case — an error which was instrumental in leading one astray in the endeavor to bring about just legal results. In this case a better understanding appearing later may well justify the intervention of grace.

This intervention may be sufficiently justified also by the mere possibility that the former decision was not in accordance with justice, even though this fear can not be completely proved. In this way it is possible to justify grants of amnesty on occasions which have nothing to do with the defendant's case, for example the celebration of an anniversary, or of a joyous national experience. Here we have a confession that all searching and striving after justice may after all be an attempt whose success depends upon the limited powers of man. It is an admission that

the best will in the world and the greatest human power may fail in the struggle for right and in the endeavor to find and maintain just law. But if we can never get rid of the thought of the human work and of its inevitable imperfection, it is conceivable that we may give some scope to the leniency of grace.

Instead of inflicting evil by means of the civil or criminal law the consciousness of uncertainty whether justice is really effected by the law will lead the one in authority to prefer that condition which, according to the poet, had once in the ages of long ago disappeared, "when from the brazen world love vanished in flight."

§ 5. *Mercy superior to Justice.* — Mercy must never be exercised in an unjust cause. Its aim must always be to find the just law in every case and, as far as possible, to carry it out. In what various ways this can be done we have attempted to show in the preceding discussions. Our results are:



Now we wish to get an idea of the essential peculiarity of acts of grace, which distinguishes them from other acts aiming at just law. This characteristic consists in the fact that he who is authorized to exercise grace within the limits allowed by the law has the *right* to realize justice by exercising an act of grace, but he has no legal *duty* to do so. There is no legal obligation, but there is an ethical duty.

When the Code says that a given case must be decided by the judge "in good faith" or in consideration of a "valid reason" or some similar expression, according to the principles of just law, we have again a prescription of the positive law. And the party applying for a decision

according to just law has a just claim to such "bona fide" decision. Disobedience on the part of the judge would signify a violation of the law.

On the other hand when the constitution gives the king the right of pardon, this means that the head of the State has a right to the exercise of which the individual desiring it has no legal claim. The positive law undertakes the external regulation of grace. It determines the cases where grace is permitted and indicates the organs competent to exercise it. But it leaves the possibility of attaining the results of just law by this method to the conscience of the person in authority alone. For example, to declare an illegitimate child legitimate by an official act of a public officer is an act of grace and can not be compelled by law (BGB. 1734). The case is different when a child that has been declared mature desires to marry before the completion of the twenty-first year, and the parents refuse to grant their consent required by the law. Here the Court of Guardianship *must* take the place of the parents in giving its consent if the parents' refusal has no "valid reason." The child has a demonstrable claim to a right decision as commanded by the positive law. And the Court of Guardianship has a legal obligation to prove and establish the presence or absence of a "valid reason."

It will be clear from the above examples that grace applies not only to the utterances of the sovereign or the other organs of the State; but that whenever one of the parties yields his right in favor of the other we have an act of grace. The expression may vary here and there, but the meaning is at bottom the same. Grace is the realization of just norms not demanded by the positive law.

We may now sum up the conceptual relation between just law and grace. The difference does not consist in the subject treated or in the aim. Grace has the intention of realizing just law. Legally, grace can step in only when

the law permits it. Grace is a special method adopted by legislation to arrive at results that are objectively justified. *Grace is the exercise of just law without legal compulsion, upon the basis of ethical duty.*

In order therefore that grace may be properly and truly exercised, within the limits prescribed by the law, two things are necessarily presupposed: *The method of just law*; that is, correct insight into that which in a given case constitutes good law; and second, *The power of the ethical will* to put to the test and carry out in practice what has been recognized as just.

As the first condition coincides with the ordinary requirements of just law, it is well, in considering the concept of grace, to lay stress upon the second. The justification of an act of grace in a particular case depends upon the measure in which it conforms to just law. But the justification of the institution of grace as a whole, to which many of our former considerations lead, will depend, in certain social conditions, upon the extent to which we can safely rely upon the influence of the second factor mentioned above. There is no other test for the appropriate exercise of grace to realize just law than the moral law as defined above. In so far as the latter aims to imbue the individual, as intensely as may be, with the spirit of devotion to right, we can trust it to have a good influence upon the proper and reliable exercise of the right of grace. For the rest, "it knows of no compulsion."

"Grace stands above the royal might,
Its throne is in the Monarch's heart,
It is an attribute of God himself."

CHAPTER FIVE

JUST LAW AND THE UNCRITICAL CONCEPTION OF LAW

§ 1. The natural feeling of Right. § 2. The feeling of Right in the national soul. § 3. Ideas prevalent in a legal community. § 4. Morality of the classes. § 5. Judicial discretion.

§ 1. *The natural feeling of Right.* — “It is inconsistent with the natural feeling of right that a person should be allowed without protest to retain what he has obtained by an illegal act, having taken it away from another who was by right entitled to it.” This is the opinion handed down by the Supreme Court of the Empire in a difficult case where an appeal was made to destroy the illegally obtained photograph of Prince Bismarck’s corpse. What is it to which the court appeals? What is this “natural feeling of right,” which suggested the opinion of the court? One may answer perhaps that it is the strong personal feeling entertained by every man of what constitutes right; a subjective opinion concerning a requisite legal norm. But it appears in the judgment of the court above mentioned as a ground for a decision. The court appeals to it in order to prove something. It calls the attention of the reader to this feeling in order to convince him of the justice of the conclusion. They mean therefore by it an objectively valid mode of considering legal matters.

We see clearly then that in reality it is nothing more than a legal norm whose content is just. Even apart from any special statute of the legislator, the court means to say, it can be seen that the principle appealed to pertains

to just law. The remarkable phrase "natural feeling of right" merely gives expression to the idea that the justice of the legal content is guaranteed by the "natural" feeling of any one who thinks about it.

This is an idea that has been advocated from ancient times. Aristotle in particular argues in detail that we can find out the content of the feeling of right implanted in man by nature by observing what all men think about it. Of greater interest, however, is the original turn given to this idea in modern philosophy and legal science. For in pointing to the feeling of right which man has by nature, these men do not mean merely the historical origin of the idea of justice in the individual man, but they mean to indicate at the same time the objective justification of that which we feel to be just. This was in general the meaning of the "innate ideas" maintained by Leibnitz and his age. In complete agreement therewith Bierling in modern times says in his otherwise excellent *Investigations Concerning the Principles of Law and Jurisprudence* "that no real legal science is thinkable unless we assume that the minds of men are essentially similar in their organization." And further that in the "theory of legal principles" we must have concepts and fundamental ideas, "which result from the essential similarity in the intellectual organization of all men respecting the theory and practice of law."

But this means to throw our conception of law into an unfathomable and unknowable sea. For sentences like those quoted above mean nothing else than that in an unknown *X*, called "intellectual nature," is to be found the unknown possibility of a fundamental insight into the legal will. The question we set ourselves here is answered by evasion. We do not learn under what universally valid conditions a legal content may be just or the reverse. We are merely consoled by the dark maneuvering of a mystical something in the background.

But even if we had a precise understanding of the origin of the idea of just law, which is called "a natural feeling of right," it would be an illusion to suppose that this settled in any way the truth value of the idea. We are dealing with a definite will content; and we wish to know whether it has the quality of objective rightness or not. Now if one were to answer this question in the affirmative because this judgment necessarily proceeds from the intellectual nature of the person giving the affirmative answer, the statement would be unconvincing. For error comes from the same source. And there is the possibility of better insight, and progress or return to the way of truth and justice. The question of the justice or injustice of a certain content of our will can not therefore be settled and shoved aside simply by pointing to its psychological origin. The solution must be effected in accordance with certain formal characteristic marks which permit or forbid the inclusion of the content in question in the class of just contents.

Accordingly the mere statement that a particular legal volition is fundamentally just in content because the statement itself represents a so-called "natural feeling of right," derived from an unknown intellectual organization of man, — is unsatisfactory in every way. It gives us no objective information concerning the real origin of that judgment. And even if it did, it gives us no insight into the criteria by which the idea of justice (which was merely applied in the above statement) is constituted as a universally valid concept.

§ 2. *The feeling of Right in the national soul.* — This, as is well known, is based upon the legal philosophy of Romanticism. The conception in its final form is that as the individual man is endowed with a soul, so there is a soul of the people as a whole. This national soul is a psychic phenomenon which can not be investigated scientifically as a separate thing, to be sure, but it manifests

its reality in the world of experience by producing in the members of the nation certain common convictions on various questions.

"It is," in the words of Savigny in his *System of Modern Roman Law*, "the national spirit present in all individuals, that is the creator of the positive law. This latter is therefore not accidentally but necessarily the same for the consciousness of every individual. . . . We must assume therefore an invisible origin of the positive law which has its existence in the common national mind. And the language of the statute book gives it merely an external embodiment and expression. . . .

"The Nation is a natural unity pervading the successive generations and uniting the present with the past and the future. . . . The only difference that there may be is that the product of the popular mind is sometimes peculiar to a particular people and sometimes appears in more than one people at the same time."

In the application of this peculiar metaphysics to the domain of law, the advocates of this theory divide themselves into two schools. The older school was of the opinion that when this conviction, produced by the popular mind, concerns itself with things of the "law," *it, the conviction itself, is law*. The legislator does not create law; he only fixes, compiles, and edits what is already present, namely the common conviction. A later school admits, on the other hand, that the legal rule does not exist *until it is actually passed*; whether this be done by the State legislator or by the customary practice of the courts or the persons subject to the law. But the members of this school also insist that all these factors merely obey the command of the popular mind as represented in the common conviction.

The *national soul* as the Romanticists in legal philosophy understand it must not therefore be identified with the idea of national characteristics, which may be observed

as comparatively uniform qualities of persons belonging to certain circles. National qualities form a material that is not negligible, and every legislator must take account of them. But they change in the course of time, and partly as a result of international fusion. They can not therefore be regarded in their special peculiarity as an absolute unit for people and law. And they naturally do not represent in themselves a supreme court of appeal and an absolute standard as is claimed for the "national mind" of the Romanticists.

According to this claim there would — "strictly speaking," as Savigny said — be no such thing possible as a doubt or an objective criticism of the content of any law at all, past, present, or future. This would be unthinkable, since law is the immediate production of the national mind, whose sway is not subject to critical judgment. Just law and the "feeling of right" of the national soul are one and the same thing. A law objectively unjust in content would be a contradiction in terms.

In reality the opposite is true, namely that no proof has ever been, or can ever be, given for the existence of a national mind, as a peculiar immaterial being. This mind whose animation constitutes the natural unity of a people is said to be a spiritual subject which lives outside of all human experience, and yet inspires the latter with the production of common conscious contents. But as it is supposed to be the psychic essence of a natural object, namely of a definite individual nation, and hence must itself be a limited and finite thing, it is hard to understand how it can escape being subject to the laws which are valid for all conditioned experience. But as this claim has been put up regarding it — and for good or ill it had to be put up — it vanishes on closer inspection into the realm of social mythology.

Nevertheless this juristic spiritualism, as a heuristic maxim, had a certain importance in its day. For in the

belief in the reality of the national soul they had after all an idea of a higher unity embracing the content of all possible laws. Every particular law was conceived as an expression of the national mind behind it. The hypothesis of its real existence formed the uniting bond which embraced all particular rules and regulations of a given law, a bond which combined the historically changing particulars into a unity, and made it possible to treat all foreign laws in a similar way. And, finally, as the assumption of national souls made its way as an explanation of all forms of intellectual activity, and the national soul was recognized as the ultimate unknowable ground of all such expressions, the idea of a common conviction in the domain of law formed part of a unitary conception of consciousness as a whole, dictated by the several national souls.

In this way the idea of a national mind existing in nature furnished a unitary method for the systematic treatment of law; and at the same time it incorporated it as a useful member in a more comprehensive and more far-reaching total conception. And now the sun of the Romantic faith has set. The "magic veil of poesy" is vanished. But the bond that fell with it has not yet been renewed. The cause formerly defended by the national soul is still awaiting its champion.

§ 3. *Ideas prevalent in a legal community.* — This expression is well known everywhere. It is perhaps used more frequently than any other in this connection. There is scarcely an annotated edition of the Civil Code in which this phrase does not occur. Wherever one of those critical passages occurs in which the legislator directs the reader to find out for himself what in that particular case is objectively justified, we are sure to find a "reference to the ideas prevalent among the people."

This suggestion is bad in form as well as in substance. The form is bad, for it is better to use legal community instead of "people." Few words have so many different

meanings as the word "people." And it is the context alone that enables us to determine which of them is intended (for example, whether the word "people" is contrasted with prince, government, official, the learned, the educated, the wealthy, the middle class, the nobility, the military class, and so on). To be sure, the difficulty in the new term proposed for "people" is that the formula would be limited to a group of persons who are capable of judging. The difficulty is increased if we examine the word "prevalent." Shall the majority decide? And the majority of whom? And finally what "ideas" are meant? It can not be those of an ethical character; for these aim at good intention, and are of no direct use in deciding a question of right conduct. For this purpose what we have to do in every case is to subsume the particular case under definite general principles. And these must be abstract in their nature if we are to have any certainty in the administration of justice carrying out its purpose as here intended. But principles of this sort have scarcely been found so far clearly comprehended in the "opinions prevalent among the people."

But be this as it may, the substance of the formula is quite unacceptable. For assuming that there really are such "ideas" as are intended, on what grounds can it be maintained that they really correspond to the just content of law? No one would recognize the "ideas prevalent among the people" as absolutely decisive, and submit to them unconditionally if it was a question of the nature of a disease and whether it is contagious or not, or if we were discussing the nature of comets. Neither will any lawyer do the same thing if he wishes to have a correct definition of the concept of property, of juristic person, of a criminal attempt, of imperial sovereignty. How then are we to swear allegiance to a resolution which is the result of a count of the accidental votes of individual members of the people, and regard it as a last resort, in the far more

important question, whether a will content is objectively right or not. It would be the same fundamental error that Socrates pointed out to Crito in a decisive manner: "Then, my friend, we must not regard what the many say of us: but what he, the one man who has understanding of just and unjust, will say, and what the truth will say."

We do not mean to say by this that the results of theoretical legal science must not be "popular." But this is a quality which they must *attain*. We can not *begin* with it, much less can we base the process of our argument upon it. In the end, to be sure, everybody must direct his conduct according to these results. And even though it is impossible to communicate the knowledge of justice and the manner of proving it to all the members of a community as completely as one would desire; and although we must confess to a certain inevitable resignation in this matter, as is the case in matters of natural science and creative art, still we are justified in our aim to make as many persons as possible share in a proper understanding of just law. But this is all we can rightly maintain in our desire to have a "popular" law so far as its content is concerned. We must determine in scientific fashion what just content is, and then do our best to spread it and maintain firmly, so far as possible, the universality of method. But the decision itself as to whether a will content is just or not, must not be derived from "opinions" gathered at haphazard, even though these be "prevalent." It must be derived from a firm method of just law.

§ 4. *Morality of the classes.* — A fundamental thought in the theory of social materialism is that the ideas of goodness and justice rest upon economic bases, and hence vary with the classes of the population which represent economic phenomena. These definite views are loosely called "ideas," even though their content be wholly con-

crete and empirical. This gives rise to a serious difference in expression, which must be kept in mind if we are to understand what they mean. In contradistinction to the materialists our terminology denotes by the term "idea" the aim to get a complete and all-embracing insight. All knowledge and all volition is bound to a definite and conditioned subject-matter. And hence the only way in which the content of the knowing and willing consciousness can attain the quality of objective validity is through the idea of the absolute whole, which is presupposed as the logical basis of perceptions and purposes, and which makes it possible to assign to every particular conscious content its place and right relation to the rest. For it is only by thus presupposing an ideal unity of phenomena and of purposes that the particular data are kept from running into each other in unintelligible confusion. And it is this idea that makes it possible to combine the particulars, according to fixed principles, into a closed system. Accordingly we shall, in our investigation, designate the concept of the justice of a legal content in general, by the term *idea*. But we shall not so designate such a principle as, for example, that the father must not abuse his parental power over his child; and much less the determination that in a given case such abuse has actually taken place. So much for the difference in expression.

But it is possible that this difference in expression would not exist if it were not for a further difference in the underlying conceptions. We distinguish (1) *the conditioned material* of opinions and endeavors relating to legal regulations which should or should not be; and (2) *the universally valid method* by which these will contents are to be determined in accordance with the *idea* of justice. If the advocates of the materialistic conception of history designate the first of these two divisions by the term "ideas," it is due no doubt to the fact that they do not take sufficient cognizance of the second.

And then there is the further misunderstanding which supposes that the idea of justice and its application to the empirically growing material is itself again a material to be treated in the same way. From this error our doctrine is free. We do not intend to set up two distinct "realities," a "material" reality, and an "ideological" reality, running side by side with the first or functioning in some other way. We make a very sharp line of demarcation between the *matter of volition* and the *idea of a possible unification of its content*.

The observation that the conceptions of just volition vary widely with the classes of the population concerns only the empirical material of actual endeavor. It is a general judgment that is relatively true, though we must always make many reservations and exceptions when it comes to matters of detail. But be this as it may, the observation above mentioned has to do only with the first of our two questions, namely the question concerning the subject matter of actual experience. But our object now is not to give a general description of the actual opinions and volitions of certain persons, but to find an answer to the question, How can we tell whether those opinions and volitions are in their objective content just? The difference in the tendencies of the doctrine of just law on the one hand, and of the morality of the classes on the other, lies in the manner of putting this question, and in the emphasis. In that very thing which is regarded as just by a certain class of the population there is necessarily contained, besides the concrete element, the concept of justice. The concrete element is subordinated to this concept in the judgment in question. How, then, can we determine what this major premise is by referring to that which the given "class" subsumes under it?

The concept of justice does not deal with anything that is, or ever will be, experienced in actual life. It deals with a fundamentally formal process by means of which we may

be able to apply universal predicates to empirical material. It may be that some persons have no interest in possessing an understanding of what such a fundamental method signifies. That is their own affair. But he who desires to be informed concerning our concept of the objective justice of a legal content and the methodical process that goes with it, must first learn to distinguish the problem thus presented from the mere description of what a particular person or his class has actually felt.

The solution of the first problem is accomplished by means of a conscious abstraction, in which the idea and the method of justice, as forming the content of a volitional consciousness, are taken as a distinct subject of investigation. When this problem is solved, we can see also whether the "class" has made a right guess in its uncritical opinion concerning justice.

Let us take an illustration. The Civil Code says that the lessee has a right to move when the use of the dwelling "is connected with considerable danger to health" (544); also that in contracts for service the arrangements for carrying out the service must be such that the workman in performing his duty is as far as practicable protected "against danger to life and health" (618). The matter comes before the court. Shall the judge decide the question of the sanitary condition of the premises according to the views predominatingly or unanimously held by the class to which the two parties or one of them belongs? And if not in this case, then why should it be done in the case of a doubt as to the existence of a "valid reason" for the dissolution of a contract of service, or in the question whether by the standard of "good faith" a defense should be allowed in a given case that the other party failed to fulfil his part of the contract, or in the case where more than one servitude in the same tenement must be adjusted "equitably"?

We see therefore that to confine ourselves to emphasiz-

ing the difference in "morals" between different "classes" of people, and to regard this as the highest principle for the judgment of will contents, would mean to confuse the conditioned material with the universal form which is our aim in the problem of the systematic arrangement and determination of that material. I repeat, the concept of "justice" can not be determined simply by referring to that which has been somewhere accepted as its concrete application. It must be determined by itself. And the same holds true of the method which makes it possible to pass an objectively valid judgment on just law in accordance with that concept.

§ 5. *Judicial discretion.* — We have now come to the last kind of judgment concerning just legal content, which is set up without critical proof and without methodically creative self-activity. All these modes of judgment have this in common that they seek gropingly for some foreign essence from which they expect to get the required result — the natural feeling of men in general, the popular soul, the prevalent notions of the parties, or the firm dictates of the social-economic classes. Some are not satisfied with any of these, and try "the judge" himself. The decision of what is just, they say, depends upon the "free" or even "most personal" notion of the judge. His "sense of justice" is decisive. As a method and a principle this is surely the weakest that has yet been suggested.

Law is primarily concerned with those who are subject to it. Its aim is to effect a certain mode of conduct and of social life on the part of these persons. Its propositions are evidently intended in the first place as a guidance for the members of the community, and the law's important concern is the right doing and forbearing of the members of the social group, and nothing else. How then can we identify the content of this command to be just in one's act and service, with the future decision of a third person according to his own free and subjective opinion! It

would be an unconscious verification of the Arabic saying, "The Christian learns the Mohammedan law when he leaves the court." When our law says, "Avoid contracts and deliberate injury 'in violation of good morals'; assert your rights and carry out your obligations 'in good faith'; keep far from 'abuse' in your family rights," — it is absurd to read into it the principle, "*So conduct yourself in the present moment as the judge will subsequently indicate according to his free judgment.*"

But apart from this it can not be maintained that the judge can make prevail a "free" opinion or a "purely personal" decision. The contrary is true. Even when the court interprets a contract according to "good faith," or declares the determination of a lease for a "valid" reason, or recognizes a "moral obligation" to make a gift, or decides that a given service was undertaken "in violation of good morals," or expresses the opinion that a husband can not be "presumed" to continue a given marriage, and so on in similar questions — in all these cases the court must justify its opinion in as convincing a manner as possible. The judgment must be objectively right, and not "subjective and free." It must be a *verdict*, and not a "personal" decision. It would be a very unbecoming state of affairs if we could apply to the opinion of the judge the statement in the "Two Gentlemen of Verona,"

"I have no other but a woman's reason;

I think him so, because I think him so."

The judgment of the court must be derived logically. A definite condition must be subordinated to a decisive norm as a standard. There is only this difference, that in one case the legal judgment is derived from a technically formed legal proposition; whereas in the cases in which we are interested, the derivation must be made from the fundamental idea of law. Technical legal science takes care that a case in law shall agree with a definite rule.

Theoretical legal science has to show methodically that a given judgment in a specific case harmonizes with the highest aim of law.

This brings us near to the method of just law, which we shall treat in the sequel. And hence we can not point to any predecessors, legal or philosophical, who solved the problem in question. But we can refer to excellent services, which will always remain as models so far as the *results* of their work are concerned, though not in respect to their method of argument and proof. I mean the practice of the Roman jurists.

The period to which I am referring is that of the classical Roman jurisprudence. Our modern legislation lays more stress than formerly upon the fundamental principles of just law as a norm in the administration of justice. But it is not quite correct to compare this effort with the problems which confronted the Roman praetors, as some have attempted to do. It is true that in carrying out his plenipotentary powers the praetor aimed at correcting the "ius civile" in the sense of "naturalis aequitas": "Si lex iusta ac necessaria sit, supplet praetor in eo quod legi deest" (D. XIX 5, 11). But his activity consisted more and more in (and finally in nothing else than) replacing firmly fixed legal propositions by other rules, which were just as technically defined as those they displaced.

The problem of placing the particular case under the fundamental principle of law, as an "ars boni et aequi", fell to the responding jurists of the second century and the period immediately following. Objectively speaking they rose to the occasion in a manner not to be found later. They exhibited a skill and capacity which the legal administration of Diocletian (*technically* good enough) no longer possessed. The same tendency was shown by the lay judges of the middle ages, to find the fundamentally just law for the particular case. But neither they

nor the practice of the courts in modern times up to now ever succeeded in reaching the plane of the Roman jurists.

The significance of Roman jurisprudence for our times has been the subject of dispute. Savigny is quite right in finding this importance in the *formal* skill of the classical jurists. Ihering, on the other hand, regards the *content* of the rules and regulations laid down by them as the valuable element in their law. But he overlooks the fact that the content of legal regulations as such is bound to be historically *conditioned*; and that universal significance can appertain only to the *conditioning form* and the certainty with which it is mastered. But, on the other hand, I can not agree with the first named author when he sees the formal skill of the Roman jurists in their technical legal science only, — in the certainty with which they mastered the major principles of the positive law of their time, in their practical application, in their “conceptual calculus.” Others have sought to show the technical superiority of Roman law by pointing to the elasticity of their concepts, the completeness of their definitions or the precision of their systematic constructions. But even if we grant all this, which is not altogether true, we doubt very much whether such services of a purely technical nature can give the classical jurists permanent fame as model masters. Technically they have certainly been at least equalled in other generations, though the credit can not be taken away from them of having made some highly original discoveries.

But their unique distinction, which raises them to the rank of co-workers in the advancement of intellectual culture, is their conscious and successful endeavor to guide the legal judgment in the sense of what is *fundamentally just*. All their expositions and decisions are penetrated by the one idea, of finding objective goodness and justice. And they are clearly cognizant, in fact, of

the difference between a merely technical treatment of legal rules and a limited subordination to them, on the one hand, and a decision in accordance with the fundamental idea of law, on the other. And they know also that this decision must not be made according to the chance notion of the person judging, or according to his "free" opinion: "*Esse enim hanc quaestionem de bono et aequo: in quo genere plerumque sub auctoritate iuris scientiae perniciose, inquit, erratur*" (D. XLV, 1, 91, 3).

This, in my opinion, is the universal significance of the classical Roman jurists; this, their permanent worth. They had the courage to raise their glance from the ordinary questions of the day to the whole. And in reflecting on the narrow status of the particular case, they directed their thoughts to the guiding star of all law, namely the realization of justice in life. And as they undertook this task, the extraordinary power of subordinating the particular to the absolute unity of the whole was given them by a kind gift of fortune. This, as we said before, lent to the results of their reflection the quality of justice, which makes their achievements worthy of admiring emulation.

There are indeed great differences between them; but the characteristic which we named is common to all of them. And it would be a fascinating study to sketch and to characterize these men (like the heroes of an epic) from the point of view here emphasized. The first among them is without doubt the great Aemilius Papinianus. And we can well see how it is that the Romans must have celebrated him as their best man in the law; whereas modern jurists, who are interested in the technical side only, have wanted to place him below Julianus and others. After him the ingenious Julius Paulus stands out with distinction, a man who never fails to hit the nail on the head. Then comes the keen Cervidius Scaevola, the profoundly thoughtful Claudius Tryphoninus, the earlier

men Celsus "Adulescens" and Caecilius Africanus, and many other names of well-deserved fame besides.

The brilliant picture is, however, not without its shadow. One thing was denied to these philosophers of justice. What the idea demands in a given case they knew with quick certainty. It is seldom that we find anything demonstrably erroneous in the large mass of opinions which we have of them concerning these problems. But they failed to consider, much less did they work out in detail, how the idea of the good may be conceived in legally regulated conduct, what sort of universal principles may follow from it, and by what method of study we may establish a connection between the particular case at issue and the ultimate aim of the law. But we need this. The demands of our time can not do without it.

I am not going to enter into a comparison between the men of our generation and the classical lawyers of Rome. I am not sure that I could prove my statements very clearly. But this much is certain, that a mere yielding to judgments that come from anywhere at all would satisfy neither the desire for uniform system nor the necessity of detailed demonstration. "Tel juge, tel jugement" may in a certain measure be an inevitable sentiment, but it must not be made a principle. Other lands and times may have managed to get along with decisions that had no adequate justification; we can not permanently endure this imperfect condition. In both these respects there is no safe remedy except that of a clear method. In vain do we appeal to the judge's "tact" as a supposedly adequate means for the mastery of our problem. It is a fortunate thing indeed if one has fine tact. The individual finds it useful in social life, and so does the counsellor and judge in legal cases. One must have it in subsuming a particular case under a general law and in carrying out in practice one's legal power of judgment. But it is useful in the act of subordinating only. Clear insight into the idea of

law and the general principles derived from it, the conscious knowledge of the possibility of applying it methodically — this, “tact” can never give. Tact is the gift of fitting a given situation harmoniously to a major principle that is presupposed. If a particular individual is satisfied with this for himself, it is his own personal affair. But he who desires as a judge or assistant to establish on good grounds a judgment effecting a just result, and to present it in convincing fashion, must above all possess a clear knowledge of the major principle and of the method of using it, and must not rely exclusively on his “tact,” nor has he a right to appeal to it in his relations to a third party. He has no more right to do this than the man who thought that the best way to determine the distance of the moon is by its appearance to the naked eye. In fairy tales it may be that one starts out at his own sweet will to fetch the healing herb from a distant land; and it happens also in the fairy tale that he wanders about until he finds it. But in the world of real life, we must have methodical study and conscious reflection. Without their help one is never sure of arriving at the object of his goal. Who ignores them has nothing to hope for in this line.

PART TWO

METHOD OF JUST LAW

“I should call knowledge from principles the power to see the particular in the universal by means of concepts. . . . It is an old wish, which may (who knows how late!) perhaps sometime be fulfilled, that instead of the infinite multiplicity of civil laws, we may at last find out their principles. For this is the only way to solve the mystery of the simplification, as they call it, of the law.

KANT.

CHAPTER ONE

THE IDEA OF JUST LAW

§ 1. The elements of legal content. § 2. The Law of purposes.
§ 3. Freedom and equality. § 4. Welfare and happiness. § 5.
The social ideal.

§ 1. *The elements of legal content.* — Every rule of external conduct contains two kinds of elements which make up the content of the rule. The one kind is made up of those elements which constitute this rule as a specific thing. They represent that constituent part of the legal content in question which appears as conditioned and changeable. The peculiarity of this element is that it presents this changeable and concrete material and nothing else.

The second kind consists of the intellectual elements of a will content which are necessarily and universally contained in each and every law. These are the elements which give the concrete content of the rule the character of the *legal*; and combine this content, which by itself would denote an isolated volition merely, with all other specific legal contents into a real whole. The unity of this second class of elements is therefore the bond which unites the otherwise scattered material into a complete whole — such as in fact it is unconsciously regarded from the start.

The first class needs no further discussion. This portion of the content of a legal rule is evident to every observer without further ado. So much so indeed that the majority of people find it hard to see that there is next to it another group of intellectual elements. For we must say it at once, and must always bear it in mind in what follows, that the two kinds of elements of a legal content are in

reality never found apart. All our legal experience consists of will contents in which the two classes are combined. Only in abstraction are we enabled to separate the elements of which a given legal content is composed. In the same way we can think of the specific matter of a given body as separate from the space it occupies, and determine the latter abstractly, although in reality there is no such thing as empty space, and the specific matter never appears to us without its spatial form.

In law the same kind of abstraction seems to meet with greater difficulty. This is due to the fact that the same process has to be gone through twice. We must first take an external regulation and discern in it the character of legality, by distinguishing it from conventional rules and arbitrary commands. Taking this legal rule, we must next consider it from the point of view (applicable to all law) of being an application of the attempt to realize justice by force.

According to our plan we have to do with the latter only. When the law says that "The lessee or borrower is not responsible for changes or deteriorations in the leased or borrowed thing, which occur as a result of use in accordance with the contract" (BGB. 548; 602), this determination, so far as its content is considered, is based upon the implied idea, "in accordance with the right conception of the law." Just as when we say, "The sun warms the stone," our implication is, "in accordance with the universal law of nature."

The former can be expressed in two ways. We have the proposition, "One who is bound under a mutual contract may refuse to perform the service incumbent upon him until the consideration is paid, unless he has agreed to do his service first." This privilege of "*exceptio non adimpleti contractus*" must be understood as indicating that in this way justice will be done in the particular case in question. We have, however, the additional law, "If

the one party has performed his service in part, the consideration can not be refused if under the circumstances, particularly when the part remaining to be done is insignificant, refusal would offend against good faith" (BGB. 320). The legislator withdraws the former rule in those cases in which its unconditional application would violate the fundamental idea of carrying out a just rule. We see therefore that in every legal content there is a methodical connection with the idea of a universal legal whole.

Accordingly if we wish to do justice to the difficult task of not merely feeling vaguely that a rule of law is to be characterized in a given case as just, but of seeing it clearly and proving it conclusively, the first requirement is to have an insight into the uniformity of law in general, and secondly into the methodical possibility of passing from that general uniformity to the particular case and mastering it with conscious deliberation and certainty. This brings us again to the requirement already stated before in general outline, except that we now apprehend the problem more precisely. Our problem is to reflect upon those universal ideas which accompany, as inseparable elements, every specific legal content. These ideas must be considered abstractly, and determined as they are in themselves. For it is the unity of these ideas that represents the highest principle of law, so far as its content is concerned.

The way we must follow to solve this problem is that of a conceptual analysis aiming to get an insight into the elements of legal content above mentioned. Together with this we must institute an investigation to determine how we may form these universal and necessary elements of all law into a unity with a formula peculiar to itself. Finally, this must lead us in the end to the establishment of a synthesis in which we can with certainty in every case combine the particular legal volition with our ultimate principle.

It follows from this that in order to find the universal and necessary elements and their fundamental and constructive unity, we must undertake a critical self-analysis. We must find out what we actually mean when we speak of a legal command as just or unjustified. We appeal here to our inner experience. The subject of our consideration is the law as historically given. The peculiarity of our investigation consists only in this, that in considering the content of the law as an empirical product, we, for the present, direct our attention to those constituent elements (and to their unitary conception) which are found in every historically given law, and which are calculated to give to this so originated legal content the quality of justice. Accordingly we find the conditioning elements and their unity by analyzing a historically given object, and by reflecting upon our experience of this object. It remains to remove a misunderstanding, which supposes that our investigation has to do with a seeking and finding "a priori." The validity of the conditions which constitute the objective justice of a historically given legal content is naturally universal and absolute; for we have to do with a formal quality of a material otherwise subject to change. But the proof of the characteristics of those uniform conditions and of the appropriate formula in which they are comprehended is based exclusively upon the treatment of an object of experience, namely the law as historically conditioned in its specific elements.

On the other hand it follows from a thorough analysis of the elements of a legal content that the method of generalization does not lead to an insight into the fundamental principle. For this is the unity of the universal elements; whereas the only things that can be generalized are the conditioned parts. Generalization may also serve, perhaps, to call attention to the peculiarities of particular elements, or may even bring about a more precise knowledge of them. But as this has to do merely with the share

that the changeable and conditioned material has in the whole, generalization finds its justification and value only on the presupposition of a universal conditioning method.

Finally it is of advantage, in reflecting upon the uniformity of a possible legal content, to emphasize the element of necessity; to concentrate one's attention upon those elements of every will content which are really universal. They must be such elements as are implied in the concept of law, when carefully analyzed. It will not be sufficient, therefore, to speak of "conditions of social life"; for specific historical cases in a given legal sphere may also be conditions of social life. This method would not therefore insure the correctness of the analysis. Nor will it do to take as the basis of our investigation "the possibility of a permanent society," for there is something relative and arbitrary in the idea of permanence, which refers more to the general impression of certain legal institutions than to the unity of universal conditions. But it is a first prerequisite for the clear exposition of a formal systematic theory that the ideas combined to form a unity must not carry any of their empirically conditioned elements with them — elements which must acquire their aspect of uniformity from these ideas.

§ 2. *The Law of purposes.* — The conception of legal regulation necessarily introduces the idea of Purpose. Legal regulation, as the concept denotes, aims to effect a definite mode of conduct on the part of those subject to it. And hence we are dealing with a subject that belongs to the realm of purposes. For a purpose is an object to be effected. Accordingly the principle at the basis of law must be in harmony with the function of purpose. What is the law of purpose? The answer implies an understanding of the question. We must first have an idea of what a law or principle in general means before we can apply it to the idea of purpose.

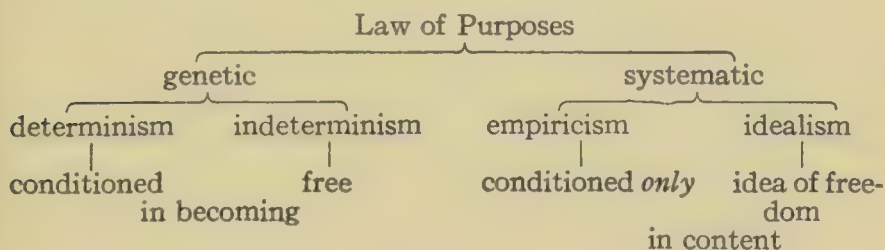
Some understand law or principle to mean the necessary course of an event which is known in its cause and effect. Others, on the other hand, apply the expression to every unity in which a content of consciousness is embraced. The former think that the aim of all wisdom is to be found in the knowledge of the process of Becoming, of the genesis and dissolution of objects. The critical method, on the other hand, insists that the fundamental thing is to have a systematic insight into the idea of Being. For if I want to know how a certain thing arises, develops and comes into being, I must first (in a logical sense) know what this particular thing *is* in its essence and in the unity of its permanent attributes. Now every one is free to choose the one or the other. But we are now in a position to require that notice be taken of the two meanings of the word "law" or "principle"; and that a deduction which moves in the one line of thought, and aims to establish systematic uniformity as a fundamental unity should not be opposed with arguments taken from the other meaning of the word, in which it denotes merely a causal explanation.

It follows from what has just been said that in the problem of the law of purposes a solution has been sought in the following methods which are different from each other in principle. He who regards the knowledge of causes as the highest thing, must naturally see how the actual means and purposes find their place as useful links in the chain of causality. On the other hand, the one who regards the idea of cause merely as a formal process which enables us to give unity to a definitely formed content of our consciousness, will have to treat that conscious content which has to do with purpose by a different method.

The first tendency is again divided into two groups according as its advocates regard the ultimate causes in our investigation as being themselves effects of other

causes, or as causally free determinations of the will, *i.e.* according as they affirm or deny determinism.

Correspondingly the second method of investigation, that which aims at the unitary being of conscious contents in general, is also divided into two different doctrines. The one deals only with a knowledge of the content of purposes as historically determined, and is called empiricism. It avoids a clear analysis of its method of procedure. To be sure, it uses universal methods in its work. But it recognizes for itself the empirical material exclusively, and does not understand that the formal method forms a distinct subject of investigation by itself. In so far as this empiricism deals with social life as developed in history, it is called by many historicism. Opposed to this is the fundamental theory which makes a conscious distinction between matter and method, and while naturally admitting the historical contingency of the former, sees that in order to comprehend the material in a system, we must have a method of procedure based upon the idea of absolute unity. Its aim is to guide and determine the subjective content of particular purposes according to the idea of purpose free from accident and chance. The name of this doctrine is idealism. To put it in a formal scheme, we have the following:



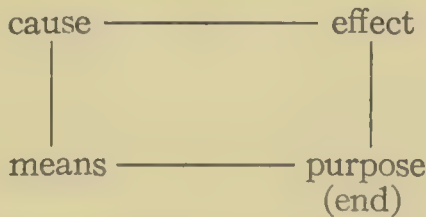
Now it is quite clear that for a merely genetic investigation indeterminism is of no scientific value at all. For when we ask for the origin of an act of will we are dealing with an event in the outer world, which constitutes a specific phenomenon. This knowledge of becoming can

not be acquired in any other way than by assuming those principles by virtue of which alone such conscious contents, known as phenomena, may be endowed with systematic order. One of these principles, but not the only one, is the law of causality. Events can be comprehended objectively, only when we think of them as conditioned by the necessary connection of successive states. And the consciousness of changing states can not be systematic and uniform unless we have a unitary conception of events as being necessarily determined by antecedent events. Whether the investigator can succeed in comprehending all his facts by the law of the unity of cause and effect is another question. And whether this can be answered satisfactorily or not does not affect the absolute validity of the law of causality as explaining the succession of phenomena. And as every cause of a phenomenon is itself again a phenomenon, it must again be an effect, and the regress "in infinitum" is inevitable. The concept of a "free" cause seems therefore untenable. In this I am not saying anything new, and beg the reader to take the aforesaid remarks in an editorial sense, intended as they are to present our own specific investigation as completely and as free from lacunae as possible. For it is surely possible to restrict oneself to the first class, namely the genetic investigation, but no one can rightly say that this would solve the problem of the law of purposes.

In the conscious content which we designate as purpose, there is necessarily involved the idea of an object to be effected or realized; as is perfectly clear in the example of a plan or a choice, and so on. Now if we consider a purpose from the genetic point of view, it is inevitably transformed into an effect. Now it is true that all effects are not alike. But the thing that distinguishes them is the peculiarity of their conditioned material. But as effects they must all be treated by one and the same method. We must therefore get an idea of what purpose means, and then try to

treat it systematically according to its own peculiar nature. If, instead of this, we place it as a link in the causal chain of Becoming, it loses entirely all its distinctiveness, viz. of a something to be effected; and is in this way excluded from the method of investigation peculiar to it, instead of being considered in its unity by that method.

But we *have* a consciousness of objects to be effected; we do possess the concept of volition, and we know the peculiar idea of making plans. Who can deny this? But this leads to the question, How can this content of the volitional consciousness, as a fundamentally distinct tendency of thought, be treated in a unitary method? That this process must be fundamentally different from that by which we order and arrange the ideas of becoming, *i.e.* the conception of nature, can be easily seen. The latter process of investigation is carried on, among other things, by means of the principle of causality; whereas our own problem creates its own method which deals with the two related ideas of means and end. And we may be permitted the remark here that there is no reason for always considering together the ideas of cause and of purpose. As a matter of fact these two ideas are found at the two angles of the following square, which are not joined by any side.



Law of purposes means therefore the establishment of a universal method by which we can divide the content of purposes we have in mind into two distinct classes, — just and unjustified. It is the idea of an absolute unity in which a content of the volitional consciousness (conditioned in its becoming) may be ordered and defined. The germ of this constructive unity is found embedded in

every synthetic idea of purpose. And all that is necessary is to dig it out, to recognize the manner of its connection with the specific aim in a particular case, and to make use of it in accordance with this knowledge.

The result to be obtained in such application and practical elaboration of the Law of purposes can therefore be nothing else than the correction of conscious contents — of that class of contents which aim at effecting certain results. If any one is not satisfied with this result as a definition of Law, if he wishes to bring in again the idea of an active “force,” and a “living” force, too, he is, like Faust, asking too much. His idea of causality is mystical, and he conceives it as something other than simply a method of unifying the contents of consciousness. He has fallen a victim to the notion of an absolutely unfolding process, containing its causal impulse within itself. According to this mechanical mythology there is indeed no other outlook possible than to search for “active” ideas. This mode of consideration always harks back to the genetic; and misses the peculiar unity of the purpose content.

But is there any *raison d'être* for the latter at all? Is there any purpose in reflection on the justice of purpose contents? The object of purpose is an event to be realized in experience. And its occurrence is either impossible or necessitated by a cause. Now since the purpose intended (such is the argument often used), in case it happen at all, must necessarily happen in a particular way, the setting up of purposes and the consideration of their peculiar unity has no justification.

This assertion is more than paradoxical. It is false and contradictory. For it assumes without proving that the occurrence of the purpose intended can decide the justification of purpose. But in saying this we have already assumed a higher law for purpose; and have expressed a specific opinion not so much about the existence of such a law as about its justification.

And this opinion again is untenable. The actual result in the course of events does not decide whether the conscious content accompanying it is right. The latter can be proved only if the specific content of a purpose agrees with an absolute standard of purposes in general. The important thing is to conceive of purposes from a unitary standpoint. We can gain this unity by combining all possible purposes of experience in such a way that we should conceive them as subject to one standard. This highest unitary standard has long been known in the language of the schools as the *final end*. We can now see clearly that a specific result, a definite occurrence of this or that realization of a plan, can not decide the justice of a volitional content which exists in consciousness as a plan; that this can be done only by means of a distinct kind of uniform law for plans and aims and choices and purposes in general. The distinction between the actual occurrence, and the uniform law, of purpose contents is quite generally and significantly expressed. Suppose one said to a chess player that a given move does not seem to him right. He would surely be surprised if the reply came that the moving of the pawn in question was causally necessary, and that was all that was to be said about the matter. And in more serious matters we always hear it said that a given resolution can be understood, but that it can not be approved — which again gives expression to the fact that two judgments have been expressed from two fundamentally different points of view.

Accordingly the question of the possibility of realizing a purpose must be kept quite separate from that of the justice of its content. The former considers an actual occurrence in accordance with the laws of experience, among which is found also the law of causality. The latter aims at a systematic insight into the content of the volitional consciousness, whose order and arrangement is possible only by means of principles fundamentally differ-

ent from those just mentioned. This division has nothing to do with the difference between determinism and indeterminism. For the last distinction appears *within* one of the two classes distinguished above, and is not at all appropriate for an exhaustive classification.

Determinism represents a correct principle of investigation in so far as it recognizes the competence of the principle of causality in that plane of inquiry in which this principle guides the order of our conscious contents; and refuses to admit any other principle contradictory to it, just because it is contradictory. But it is a mistake to suppose that all conceivable contents of consciousness belong to this one sphere. For in reality there is another fundamental method of uniting conscious contents, in which causality has nothing to look for.

Indeterminism is correct in so far as it lays stress on the independence of the idea of purpose alongside of that of causal becoming. Its error lies in the fact that it subjects the former to the kingdom of causation. When it is said that we must not confine ourselves to the causal order of becoming as a principle, because it does not completely explain the facts, this does not mean that within the sphere of phenomenal becoming we must assume certain special enigmatic forces, in addition to the natural causes. The emphasis above expressed means that outside of the conscious content which is concerned with phenomenal becoming, there is still another, whose peculiarity consists in making its central idea that of purpose and in seeking to comprehend the independent law of this concept.

It still remains to remove a misunderstanding. The concept of *means* involves the idea of a future object as something to be effected; whereas the concept of *cause* implies the future object as something that is coming to be. The connection of cause and effect expresses therefore a necessity in which the effect is thought of as something that came to be. On the other hand the order of means

and end (purpose) inevitably denotes that the thing desired is thought of as something to be attained. But these two modes of thinking must not be regarded from the present position of the person who happens to be reflecting upon them. Else we should be forced to the peculiar conception that the chain of causes was suddenly interrupted just before the future which began accidentally at this moment, to make room for the rule of purpose; and that the latter similarly was without any influence in the actual past.

The theory here presented has nothing to do with any such conception. It is a systematic distinction between abstract methods. These may be applied equally and at the same time to the whole course of human history. And whether a question belongs to the past or the future of the person who happens to be thinking now is quite immaterial so far as the validity of the two methods is concerned. I can with perfect justice apply now the law of causality to human acts of the year 2000 of our reckoning, the only question being whether I shall succeed in matters of detail. And on the other hand there is no reason why we can not subject the reform laws of Augustus to the critical question of the purposes intended by them and their objective justice. The difference between cause and purpose lies only in the tendency of an abstract theory and the uniform law taught therein. But there is no difference between them in reference to a period of time accidentally and empirically defined.

§ 3. *Freedom and equality.* — Now what is the fundamental law of the purposes of external rules? That it is this law of purpose with which we are here dealing can not be a matter of doubt. For we are trying to effect a just social life in the external conduct toward each other of those united in a community. How can we apply to this the idea of a unitary synthesis of purpose content? What is the highest aim which represents the final purpose of the regulation of human co-operation?

Freedom of the citizen, as the highest object of the law, has exerted the greatest influence in this connection. Many a time State constitutions as a whole, as well as particular legal rules and regulations, have been condemned because they restricted this external freedom. Accordingly individual freedom has been raised to a standard and principle of just law.

This conception of a free State is theoretically untenable. It leads its advocate into logical contradictions from which there is no escape. It has found a celebrated expression in the work composed by William Humboldt entitled, "An Attempt to Determine the Limits of the Activity of the State." His opinion is, "That true reason can wish no other condition for man than that every individual should enjoy the most unrestricted freedom to develop himself in his own peculiar way out of himself; and not only the individual man, but physical nature also should receive no other form at the hands of man than that given to it of his own free will by the individual according to the measure of his need and inclination, restrained only by the limits of his power and right." But what are the "limits of his right"? The rights which a man calls his own, he has because he has received them from the law. They are the regulated relations among those who are subject to the law according to which a certain mode of conduct is to be effected by way of compulsion. Whether we think of property or obligation claims, of parental power or participation in public life — it is always a question of a delimitation of those spheres in which every one desires to be respected by the other, acknowledging the corresponding obligation to respect those limits in turn. And in the combination of these rights and duties we find the basis of a community. The *right* manner of co-operation, the *right* mode of bestowing and exercising "rights" — this is the very problem we are investigating. It follows therefore that this theory of the State names as the

criterion of a certain legal order that very thing which the legal order has created by its commands.

This fundamental error can not be corrected if we maintain the idea of freedom as a principle of law. Even if we omit the words "and right" in Humboldt's formula, the thought remains that the final purpose of law is the freedom of the citizens. But this is in every respect contradictory. This idea is opposed to the concept of law in general. The latter possesses the essential quality of sovereignty. It is a compulsory regulation, the validity of whose commands is entirely independent of the free consent of those subject to it. To retain this compulsory regulation in principle, and at the same time to hold its aim to be the unrestrained freedom of those subject to the law, is to be guilty of an insoluble contradiction.

The same antinomy will meet us if we consider the thing itself. The freedom that is spoken of here means not ethical, but external freedom. It does not denote the independence of one's volitional content from a merely subjective desire, but the rejection of external dictation of one's conduct. This freedom, made a principle, would imply that a person is permitted in principle to do and forbear according to his own personal desire. But this would lead to the opposite of the objective goal that is aimed at.

It follows from this that the question of the individual's freedom to decide the manner of his participation in social life belongs to the investigation of the right means of legislation, but it plays no part in the fundamental problem of the idea of just law.

The case is somewhat different with the second concept in the title of this paragraph. As every one knows, the demand of external freedom has for a long time been associated with that of *equality*; the latter sometimes appearing as opposed to the former, as for example in anarchistic individualism. We need only emphasize here

that the formula of equality — “equality before the law,” as the constitutions say — is no more adequate as a solution of our problem than the other. It leaves the solution open.

As we are dealing with the conception of a universal principle, it stands to reason that we must not understand by equality something relative or to be granted in numerical fashion. Nor are we concerned here with historical particulars; for example, with the removal of concrete distinctions of classes. We are not dealing with the particular content of positive regulations, nor with the prohibition, by modern legislation, of legal institutions that have come down to us from the past. Our question here is whether the principle of legal equality is calculated to give us the correct expression for the idea of just law. This we must answer in the negative. For the juridical principle of equality of rights is expressed simply in the following rule, that all those who come under the law must be treated according to one and the same method. But what this fundamental method is, as objectively considered, still remains to be thought out in detail. Similarly the principle that all individuals have a uniform place in the community corresponds to the concept of law, and must be derived from it in a methodical way and not arbitrarily. But this too is nothing more than a result which follows from an analysis of the concept of law; whereas the fundamental principle of the content of legal volition is a question which still remains open.

§ 4. *Welfare and happiness.* — This principle is best expressed, no doubt, by referring to the benefit of the individual. The supposition is that the highest aim of the law consists in securing the welfare of those subject to it, and furthering their happiness. But this social eudaemonism has no foundation (“*Wirtschaft und Recht*,” § 100).

The promotion of the subjective happiness of those living under the law is an insoluble problem at the outset.

If we mean inner happiness, inward peace, the happiness arising from the consciousness of realizing one's aims, the "joyful heart" of the Harz proverb — this no law or statute can give. Nor is it easy to come to an agreement as to what constitutes external well-being and how it can be secured. An attempt has been made to treat happiness as an independent thing and it was said that the thing to do is to create as great a quantity as possible of the greatest possible happiness, which should then be distributed as equally as possible among the individuals of society. As if happiness could be separated from the feeling subject and be distributed among others, like food or amusement!

To set up the securing of personal pleasure as an ideal aim for the legislator would be justified only if the highest law of right volition in the individual were the promotion of his personal well-being. But as this is not the case; as, on the contrary, the characteristic of right human volition is the fulfilment of duty, without regard to the subjective comfort of the agent, — the highest aim of human society can not be the happiness of its individual members.

To be sure, the negation of pleasure as the ultimate principle of human volition is always struggling with the subjective desire for pleasure. It is not every man's business to take up this fight consciously and resolutely — to subject his desires to a kingdom of law and order. And if he succumbs in this fight, he easily comes to the position, prompted by self-love, in which he maintains and demands that the subjection of his person to his desires is and should be an objectively justified law. In this way eudaemonism arises as a supposed principle. And many a one agrees with the sentiment, expressed by Wieland:

"Error that gives me happiness
Is worth as much as Truth
Which presses me down to earth."

But the maxim is in reality untenable.

The vicious circle in this reasoning consists in the fact that the principle thus set up professes in turn to be objectively right. Its earnest desire is to indicate under what conditions a content of human volition may be called objectively just. And the answer it gives to this question is, when it is subjectively valid. This answer presupposes that there is a distinction in human consciousness between the objective and the subjective; but, without being aware of it, it defines the former by means of the characteristics which belong to the latter, though the two are admitted to be contradictory.

What the individual is pleased to regard as his subjective happiness may, positively speaking, be merely a limited aim. For it is always a question merely of fulfilling a desire of a relative and conditioned nature. For this reason the concrete feeling of happiness for which one strives may again become a specific means for a further end. It can not give a finally adequate answer to the question, why any one should enjoy a given pleasure. It does not solve this problem by referring to an objectively valid statement which may be regarded as the highest law of volition. And if a man's personality, just as he is, can not represent the expression for the universal law of human purposes, it follows that the right method in the discussion of the problem of a just community can not be that which is made to depend upon merely subjective efforts and desires. The well-worn saying that "interest is the guiding star of law" has no more truth in it than the parallel statement that "appearance is the guiding star of natural science." In both cases the material is confused with the uniform method of working it up. It is the latter that interests us here.

Accordingly it is not our idea (as has been thought) to *exclude* happiness and the gratification of our senses, impulses, and needs from the purpose of social life. This would be absurd. On the contrary, social life consists in

the co-operation of men to bring about the satisfaction of individual needs. But we must bear in mind that this represents only the *matter* of our problem. But if we want to know about the *formal law* according to which this co-operation must be ordered and determined, then we must not think of the personal happiness or the subjective interest of those concerned, if we wish to avoid the contradiction above mentioned.

The inevitable need that has been felt for an objectively independent standard has led after serious reflection to the idea of the *common weal*, the "*salus publica*." The attempt is an old one. Cicero formulates his own conception as follows: "Jovem ipsum ius hoc sanxisse, ut omnia quae rei publicae salutaria essent, legitima et iusta haberentur." This scarcely has in view a mere summation of purely subjective and individual interests. Such summation is equally far from the minds of the modern representatives of the "interest of the whole." "The general welfare is the basis of the laws" — this statement is found at the head of the first "Sketch of a General Prussian Provincial Code" in 1784; though it did not remain finally in that form. The critics had their eye on the formula as early as then. "The common weal," says Schlosser in his "Letters on Legislation," "is a mixture of an infinite number of different ingredients." We may also say that it is nothing more than an expression of the eager desire for an objective standard that would liberate us from our merely subjective desires. The will and desire for a uniform principle in the creation and exercise of law; for a universal point of anchorage amid the raging waves of merely personal strivings; the hope of a uniform process aiming at just control, and of a clearly defined goal in our regulating activities; in short, the hope and desire, the will and the wish for *objective justice* — all this is expressed in the idea of the "common weal." But nothing more.

§ 5. *The social ideal.* — If we try to find out what is contained in the concept of a legal association of persons, so far as its objective and universal content is concerned, we come to the conclusion that the members of the association can further their objects better by standing together. Every system of law necessarily has this one thing in mind, that those subject to it can carry on the struggle for existence with greater success in common, so that in joining the community each one is at the same time serving himself best. The theoretical elements we are here investigating (see above, § 1), which are found in every legal rule, inseparably accompanying the concrete material of every particular enactment, are, accordingly, the adjustment of the purposes of the community and of the individual members thereof. When we strive to carry out any specific law, we necessarily express our will of harmonizing these purposes in the law in question. And in so far as we succeed in bringing about an agreement between the universal and particular elements, and in avoiding a contradiction between these two constituent parts, in so far as is the content of our rule accordant with law, and just.

A universal element of legal propositions is therefore the idea of adjusting the individual desire to the purpose of the community. But here again we must not think of the community as a concrete association having certain conditioned aims. Nor do we mean a definite "economic development," which is merely a phrase descriptive of certain empirically conditioned social phenomena abstracted from the whole of social life, and denotes therefore the material to be treated and not its formal law. What we have in mind is the community as the formal unity of all conceivable individual purposes. We think of it as a method of combining these concrete and isolated desires into an absolute unit with a common and final purpose. The idea of just law can only mean the unity of the

methodical adjustment of individual purposes in accordance with the one final purpose of the community. But a harmony of individual purposes can not be made certain so long as the determining principle in them is the subjectively conditioned and specific object of desire. The specific purposes of desire and effort form the material to be treated. But, as they appear in the individual subject they must not raise the claim of being in themselves the highest aim. This would be incorrect even in considering the volitional content of the individual himself, not to speak of the community, whose nature as a just institution we are here investigating. The particular subjective aims followed by the members as subjective, may sometimes harmonize as a matter of accident; but there is naturally no assurance that they will harmonize as a permanent principle.

It follows therefore that the aim of a legal community can only be the union of the individual members so far as their volitions are *ends in themselves*. The abstract idea of an absolute unity of social existence demands a fusion of these elements in the efforts of the members which may be regarded as universal. When we speak of the abstract concept of a community, we have in mind the union of all volition whose aim is *free*. In this way we obtain the formula of a *community of men willing freely*, as the final expression which comprehends in unitary fashion all possible purposes of persons united under the law. I call this *the social ideal*.

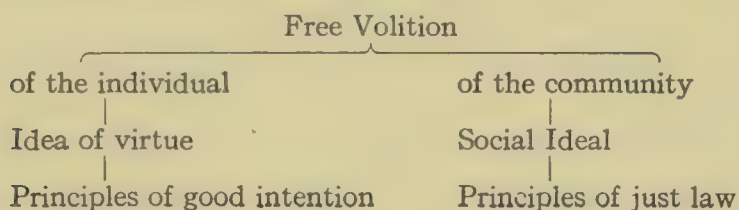
The definition of the concept, *just legal content*, is the same as that of *social unity*. The content of a rule of conduct is just when it corresponds in its specific character to the thought of the social ideal. We must now show how this is to be proved methodically. We must observe besides that the validity of the social ideal depends upon the insight that it is the only general expression in which is contained the idea of the objective unity of the purposes

of men united under the law. As it has nothing at all of the specific content of any concrete endeavor, it is equally valid for all conceivable aims of external norms. It may be applied to every one of them and endow it with its own meaning. It is the only thing which belongs to all legal purposes in common. And the only question that may be raised is, How can we make conscious use of our fundamental idea in dealing with specific legal questions, and how can we carry it out methodically?

On the other hand, we do not admit that the idea of just law can be expressed better by the aim of individual *perfection*. For we are dealing here with the project of co-operation, and with the right way of carrying on and arranging life in a community. In other words, we are dealing with the application of the idea of free volition to the common weal and the conduct of its members toward each other. Those norms therefore are just which determine the external doing and forbearing of the members of the community. Now we showed before, when we discussed the concept of just law, that the method by which this volitional content is to be derived from the idea just mentioned must be kept distinct from that which has to do with the ethical improvement of the individual. The second method has to do with the ideal aim of perfection, which is concerned with good intention, *i.e.* with purposes which the individual sets for himself, and not with rules which come to him from the outside, and demand of him only just conduct. For we must always remember that we are not dealing now with relative and particular purposes of other persons, or with their relative "perfection." We are not now considering concrete aims in a special case, such as education or help, but the idea of the absolute guiding star itself. It is in this sense that we ask, What is the correct formula for the idea of *just law*? And this can only be an expression in which society, as an external union, receives its ideal form. On the other

hand, perfection is always an aim for the individual. I can set up my own perfection as an aim, but I can never take as my highest law the absolute perfection of another person. This must be left to this other person, to work out his own salvation in accordance with the moral law. But as in the problem of *just law* we are dealing with the unity of volitional contents which dictate the conduct of other persons, it is clear that the idea of perfection can not be the correct expression for the final aim determining our method here.

Let us return now to our definition of the social ideal, and endeavor to present in schematic fashion its position in the unity of volition as a whole.



CHAPTER TWO

PRINCIPLES OF JUST LAW

§ 1. Regularity and principle. § 2. Derivation of the principles.
§ 3. The principles of respect. § 4. The principles of participation.
§ 5. Significance of the principles.

§ 1. *Regularity and principle.* — Justice of a legal volitional content means agreement with the *social ideal*. This is a formula for the concept of regularity in the objective content of a legal norm. It is therefore a final expression for the unity of those elements which accompany every legal rule and represent its aim. It is necessarily contained in every such rule. For all rules of law with their specific commands represent the general thought of a *right* adjustment, and are controlled by the unitary idea of *systematic regularity*. The latter is not again a specific object of experience, although we are able, in an abstract investigation, to see its function as a directive element in experience.

From this it follows that we are not dealing now with an ideal system of law as a brief resumé of the historical material of life under the law with a view to its realization in a community of free men. To him who can see nothing in a legal content except its empirical elements, our formula of the social ideal means nothing at all. We can no more think of the unity of law as being itself an ideal body of law, than we can think of the uniformity of nature as being itself a certain ideal system of bodies. When we think of uniformity or regularity, we must abstract from all specific legal *matter*, though all such specific material is controlled by it.

But neither must the social ideal be conceived as a distinct legal paragraph which goes beyond the positive

law, and directs specific instructions and demands to those subject to the law. *The idea of a community of free men is not itself again a legal proposition.* It is not on the same level with the rule that a debtor must add interest on a delayed payment, or that in exercising a servitude care must be taken not to injure the owner, or that in the division of an inheritance the adjustment should take account of any portions previously received. In the idea of just law as defined by the formula of the social ideal we are dealing not with the content of a legal proposition, but with a formal *method*. It denotes that higher unity which is the necessary condition of every true judgment about just law. In order to derive therefrom a concrete norm, we must apply it to empirical legal material.

It is true that people are guided by subjective desires and can not get away from their personal interests. This is the very reason why the problem arises of finding a right adjustment among the opposed desires and demands. The question now arises, Under what conditions is the decision in such a dispute *objectively just*? And by what method can we prove that it is just?

If we are to solve these questions, we must use the same process in all cases, for the concept of a just decision is always the same. The idea of the social ideal denotes therefore the unity of those conditions by the maintenance of which a decision in legal matters may deserve the predicate *just*. This leads to something else. The idea of the social ideal can not be applied directly to the concrete problems of legal judgments endeavoring to find the right adjustment. It is true, indeed, that every proposition declaring just law is, as a matter of fact, accompanied by that idea. But this does not yet give us the process of derivation. The natural scientist who desires to know a particular phenomenon in its relation to the general law, does not simply bring it at once under the idea of the absolute unity of all phenomena. In order to

understand it properly, he first goes back to derivative principles, then to natural laws based upon these principles, until he has given his specific problem its systematic place in the whole. In the same way we also, in our problems of just law, shall have to have a system of principles, and then again subordinate doctrines and ideas, by the help of which we shall be able with assurance so to work out the particular case that it will correspond to our idea of the unity of law. The practical significance of the idea of just law in general is this, that with its help alone is it possible to work out a *universal method* for just law in a specific case. We must now proceed to develop our *principles*.

§ 2. *Derivation of the principles.* — In undertaking to work out the universal principles which are to span the bridge between the idea of just law and its significance for specific legal questions, we must take notice of a two-fold danger and try to avoid it.

1. The principles must not be gathered at random from historical observation. Else we should have no guarantee of their necessary completeness; nor should we have the possibility of controlling them as a systematically connected whole. This applies especially to the most thorough attempt in this direction made by Ulpian, "*Honeste vivere, alterum non laedere, suum cuique tribuere*" (D. I, 1, 10, 1). The derivation of these three principles from the idea of law is not clear, nor is their inner relation to each other clear.

2. We must keep out of the content of our principles everything that is merely empirical and pertains to the material. They must be fundamentally constructive functions of judging, and not once more definite propositions of concrete signification. The "*Déclaration des droits de l'homme et du citoyen*" of 1789, or "*Die Grundrechte des deutschen Volkes*" of 1849 are not made in the sense of our investigation.

We must proceed as follows. Every legal investigation may be carried on from two points of view. We may regard the standpoint of the individual *qua* individual as the center of our investigation, or we may emphasize the community of individuals and their common aims. It is self-evident that in a complete union under the law both of these aspects are necessarily contained. For as such a union implies at least two members (unlike the problem of ethics), we can not possibly get away from this twofold aspect of considering the matter.

This dualism has been made use of in comparatively fundamental fashion since the time of the classical Roman jurists for the purpose of technically working out the positive legal material; especially in the distinction between civil and public law. And our science is right in refusing to remove this distinction or even to obscure it. On the contrary the proper thing to do is to bear in mind as clearly as possible the meaning of the distinction as well as the consequences justly flowing from it. The analysis of the legal concept itself always necessarily leads to this problem.

In our investigation here we are not interested in following out further the system of positive law as thus built up, but in trying to see in what way the twofold aspect above mentioned may be made significant for the general application of the concept of a just legal content. Now it appears on closer observation that the twofold manner of thinking from which we started is already contained in the formula of the social ideal. This idea conceives of the persons united under the law as men who follow their particular aims in so far as they accord with justice. It follows therefore that every individual absolutely respects the other and is respected by him. For the social ideal demands that the individual should not be forced in his legal relations to renounce his justified interests. The principle here used as a standard requires that there shall

be mutual respect of each other on the part of those united in the law. We shall therefore in the sequel first consider the individual as following out his own purposes.

As on the other hand the principle of social investigation aims at the idea of living and working together as a unit, and finds its conclusion in the absolute solidarity of interests, we must also emphasize the social members in their unity. Here we think of the individual as a member of the whole, in which all must, for better or for worse, have their necessary share. The first lays stress upon the *respect* due to the individual in his specific right volition, whereas the second insists on the idea of social community and mutual *participation*. So we say, "Every man must carry his own burden"; and yet, without contradicting the prior warning, that "one should bear the burden of the other."

These two aspects of the social principle must now be applied to concrete questions of law; and the important thing is to find the right attitude and activity of the individuals in relation to one another. But these persons stand in certain clearly defined legal relations to each other; and in thinking out the conceptual meaning of these relations we shall find implied the prescription of a certain mutual mode of behavior among the individual members of the community. The rights and duties of the individual are derived from their legal relations; whether we conceive the latter at the start as regulating our relations to other individuals or to the whole of those subject to the law. Accordingly, whenever we wish to consider in fundamental fashion whether a given legal content is just, we shall have to think of specific *legal relations*. And in that case there will be, generally speaking, two possibilities: First, the question whether this unitary relation should be *maintained*, or whether, as a matter of right, the law should not rather deny it. Second, the question how a legal relation that has been acknowledged as right is to be

carried out. These two questions appear in the demand for the right *respect* of others, as well as in that of just *participation*. Each of these ideas, when applied to the principles in which they are to be carried out, divides itself into two aspects requiring distinct treatment. We have accordingly *four principles of just law*, which may be treated in two corresponding pairs.

§ 3. *The Principles of Respect.* — 1. *The content of a person's volition must not be made subject to the arbitrary desire of another.* 2. *Every legal demand must be maintained in such a manner that the person obligated may be his own neighbor.*

Both of these principles aim at enabling the individual member of a legal community to determine his own volition in freedom that accords with justice. The first principle starts from the idea of an existing duty and limits the extent to which the members of a legal community are bound one by the other. The second is concerned with the measure in which a legal demand is to be imposed, and restricts in systematic fashion the manner and the scope of the service demanded. The first refers to the *maintenance* of legal relations, the second to their *execution*. They are derived directly from the highest aim of the law, whose formula is the social ideal. As the concept of a just legal content is based upon the idea of a community of free men, it follows necessarily that in every external regulation the person subject to it always has the possibility of choosing the right. A legal command must not be understood to mean that the individual shall give up everything for the conditioned subjective purposes of another; that he must have the obligation, and is bound to regard those personal aims of the other as his own final aim.

I use the expression "arbitrary desire" in the above formula to represent that volitional content which says to another, *You shall will what I will, and because I will it.* The second part of this statement — because I will —

has reference to the use of force or deception in one's dealings with another, or to imposing an obligation in some such other way, as will appear more clearly when we treat of the *practice* of the law. The first element — what I will — refers to the kind and amount of service incumbent, let us say, upon the debtor who promised to do something that is “opposed to good morals.” Here again we have to consider how far a certain legal relation is to be maintained. It is clear that this sentiment is opposed to maintaining a limited obligation merely because it is due to a person's own resolution.

The paradoxical statement has been made that there would no longer be any social problem if every one took off his hat to the other. There is a grain of truth in this strange statement. To curb one's own desires through respect of another, and to do so with absolute reciprocity, must be taken as a principle in the realization of the social ideal. Just law — on this line of reasoning — exists when the sense of the law's demand upon a person is such that in thinking of his legal duty he can still regard himself as his own neighbor. On the other hand a legal command is unjust when it puts the social volition of a person wholly at the disposal of another.

One may perhaps be reminded of Kant's definition of the concept of right. “Every act is right,” he says, “which is consistent with every one else's freedom, according to a general law.” I do not say that this idea is objectively untenable. But there is this error in the formula that it undertakes at the same time to define the concept of law as well as to determine when its content is just (see above, p. 86). Besides, the use of the word “freedom” is not clear, and it is not brought out (as F. A. Lange has already shown) how it is related to the “general law,” to which Kant refers. This may account, too, for its incompleteness. For while the above definition, when properly interpreted and carried out, may be made consistent with the

principles of *respect* just laid down, it is only in a very indirect way that we can make use of it in the principles of *participation*, to be taken up in the sequel.

§ 4. *The Principles of Participation.* — 1. *A person under a legal obligation must not be arbitrarily excluded from a legal community.* 2. *Every ability of disposing that is granted by law may be exclusive only in the sense that the person excluded may be his own neighbor.*

These propositions aim to carry out the idea of *community*. They express the thought that the legal command which unites the individuals to carry on the struggle for existence in common, must not become untrue to itself. But it would be guilty of a contradiction if it subjected the individual by compulsion to the social union, and at the same time treated him in a given case as a person who had nothing but legal duties. This would be a caricature of the idea of *co-operation*. The desire to avoid the logical contradiction which would result between the fundamental idea of just law and the particular illustration thereof, leads to the principles of *participation*.

Here, too, there is a double signification in these principles according as we start out from the idea of limiting the *existence* of exclusiveness, or from that of restricting the manner and measure of its *operation*. And here, too, they must not be considered as rules distinct in content and having nothing to do with each other, but as distinct formal processes in the service of a fundamental direction of thought. For it is quite impossible to regard the principles above given as legal propositions of definite and conditioned material. They are not at all concerned for example with the positive regulation of rights concerning material objects. The latter are taken from the historical development of our legal system. And the second of our above named principles only gives a suggestion concerning the method of carrying them out and illustrating them in practice. The first principle on the other hand may also

be stated thus, that a member of the legal community must not be left to carry on the struggle for existence by himself alone. These principles also, therefore, so far as their peculiar content is concerned, have nothing to do with specific legal propositions and institutions. They are fundamentally constructive methods for judging and determining positive law, but are not themselves again conditioned rules thereof.

Finally one must not take exception to the fact that the person having a claim to just treatment appears in the language of the principles as a "member of a legal community." This does not of course mean that we are thinking of a definite political law governing the conditions of membership in a given community. The principles are meant to serve as methodical guides to tell us what sort of thing may, in general, become a norm of just law. The meaning therefore is that a person who is thought of as standing under the law in common with others, must not be treated at will as an isolated individual and be left to himself. The principle refers therefore to just conduct toward all men without exception. But nevertheless it is supposed to give us a method of *just law*. Accordingly the principle undertakes to judge those norms which stand externally above the two parties in question, and adjust their mutual conduct toward each other in accordance with justice. But this can be done only by such formal direction as will unite each of the two in the same way. We must come to the assistance of the other man and not exclude him, just as we should expect him to do to us in a similar situation. Accordingly as we should like to bind him and make demands upon his conduct, everyone should behave in the same way toward him and allow him to share with us. Our formula, therefore, gives us the idea of a just community in the matter of participation; and makes it possible to create just norms governing our external conduct in questions of legal exclusion — a

thing which can not be adequately and certainly done without taking account of mutual obligation.

§ 5. *Significance of the principles.* — All principles lead to the highest idea of just law, which forms the unity of those elements of thought that are common to all possible legal aims. Now as the latter require for their realization specific legal relations, it follows clearly that the principles must be characterized by *limitation* — restriction of obligations as well as of exclusions.

In the first case again two things are possible. Either we are confronted with a one-sided obligation, and then its restriction in accordance with the principle is self-evident, or the obligation is mutual; in that case we must see that there is an equivalent on both sides throughout the extent of the mutual relation, and that each one is obligated to the other in accordance with the principle of respect, “*Quod aequa lance servari aequitatis suggerit ratio*” (D. XLII 1, 20). In the matter of exclusions we have only to apply the second in a proper manner, for here we always have on the one side the community of persons subject to the law; and we have to see that there is mutual respect in the existence as well as the exercise of the rights of exclusion.

That the principles of just law are characterized by their *limiting* function is due to the fact that law is an *external* regulation. It always represents a volitional content that aims to determine others. It is always heteronomous. And the important question is this: How far are we justified in determining the conduct of other persons? The concrete content of such volition is given by historical experience. But its formal quality as just or unjust is determined by the proper methodical limitation of the legal enactments as they naturally arise in experience.

On the other hand, the principles of just law as applied to the rules of conduct of the community are *constitutive*

in character. But this character has reference only to the question of the *justice* of this conduct, and not to the definite subject matter of the propositions themselves. They must wait, as we said before, for the supply of historical material. Of themselves they produce nothing. But when this material is furnished and is ready at hand in its natural growth, they have to direct and to determine it. It must be subjected to them in their capacity of being universal modes of correct thinking, so that it may, as a result of this reflection, receive the quality of being just in content.

Now as the principles have nothing in them of the specific content of a conditioned subject matter; and the latter on the other hand represents, in comparison with the former, nothing but a confusion of particulars, it will be necessary to arrange the empirical material of legal experience in some sort of unity of its own before it is submitted to the treatment of the principles.

In our journey from the idea of just law, as the highest point, down to the specific questions of legally regulated social existence, we have reached in our principles merely the first station. If one misses this, he can not begin to find the right connection between the highest idea of all legal order and the many isolated particulars of concrete legal experiences. But having these principles, we are not yet sufficiently equipped to be able at once to enter upon the practice of just law. It is absolutely necessary for us, in working out a methodical abstraction such as has not yet been attempted, to proceed step by step, and constantly to illuminate the entire landscape through which we are to pass. We shall leave for a short while our problem of immediate descent and the subsumption of the particulars under the whole, to institute from the standpoint of our principles an investigation in two directions, in order to determine what is meant by the *matter* of just law and what by the *means* thereof.

CHAPTER THREE

THE MATTER OF JUST LAW

§ 1. Matter and form. § 2. Historic Law. § 3. The so-called relations of life. § 4. Manner and custom. § 5. Social economy.

§ 1. *Matter and form.* — The concept of *matter* is used here in the sense given to it by Aristotle in his logic. It denotes the general as opposed to the specific difference, the genus as distinguished from the species. According to this the matter of just law is *the law as it has come down in history*. It denotes this historical law without any exception, and as an object which embraces with absolute completeness all the problems that may conceivably arise in this connection. The argument must always start from the distinction of matter and form. These concepts must be established and made use of not merely for the problem we wish to make clear as a whole, but also for any particular questions which may arise.

What is meant by form in the logical sense? The empiricist thinks of a receptacle, an envelope, or a similar corporeal object, which at most he then thinks of metaphorically. And he wishes to know whether this corporealized cover is to be thought of as the cause of the thing enveloped within, or perhaps the reverse. A more fundamental question for human insight, he thinks, does not exist.

But this is not going far enough. The form of a thought content is the unity of the *permanent elements* in contradistinction to those *subject to change*. To obtain clearness and unity we take apart the content of consciousness,

which appears in reality as a composite thing; and we try to find those elements in our mental analysis which are the *condition* of the others — those others which in turn are determined in their peculiar nature by the former. Thus, as we said once before, mathematical space is the form of the corporeal world, though not itself a body. But it is a conditioning element of specific external phenomena. Form as the condition of matter must therefore always be taken in the logical sense. It has nothing to do with the special question of *causal* determination. It represents a mode of dependence within the logical elements of a thing, such that the first (form) can be clearly understood when considered by itself, whereas the second (matter) escapes the mind entirely unless it is specifically formed and determined by the former.

In this sense the concept of justice in our investigation, as developed through the idea and the principles, constitutes the form in the judgment of a legal content. And there is no other *matter* to which it can refer except the positive law in its empirical constitution.

For the purpose of theoretical insight as such, and apart from definite practical utilization, we may also think of the form of an object as the main tendency of the investigation. For if we have a systematic knowledge of the form, which means the logically permanent elements in the contents of consciousness, we are enabled thereby to master in unifying fashion the conditioned matter determined thereby. This is clearly shown in the relation of mathematics to natural science. The latter becomes theoretical science to the extent that it is based upon the former and receives its exactness from it.

It is therefore a great mistake to speak dogmatically and in derogatory fashion as the empiricists do when they condemn a thing by saying it is "merely formal." It is possible that they confuse "formal" with "formalistic," a distinction we made clear in our introduction. But in

so far as this is not the case, the expression is assuredly erroneous. For all investigation aiming at fundamental clearness has to do with the *form* in the sense indicated; and on the other hand all material is chaos and confusion so long as it is not submitted to the unifying process of a *formal* insight. It follows therefore that the *formal* investigation which endeavors methodically to throw light on this process by which the matter is subordinated to the form, — this formal investigation is the fundamental condition of all that may be called truth and justice. For these reasons we shall have to consider two things in the sequel. We shall have to find out whether the historical elements of our legal systems are an indispensable requirement of just law. This we shall necessarily have to decide in the affirmative. The next question is whether these elements form the only material of just law, or whether perhaps, as has been said, relations of living, or conventional rules, or perhaps social economy must be given an independent position in this material. This we shall have to decide in favor of the first alternative.

§ 2. *Historic Law.* — Herodotus relates of the Medes that after their separation from the Assyrians they lived without laws. Then Dejoces appeared among them as a just judge. The inhabitants of the village in which he lived came before him to decide their disputes. Soon the fame of his justice spread among the rest of the population and they came from all parts of the land and asked him to judge them. When Dejoces saw how great was the confidence which the people placed in him, he withdrew from the judgeship; and lawlessness again prevailed.

The just judge in this story took the place of the legal norm. But what was it that he decided with his judgment? Business affairs and differences among the people. And what was the subject of the differences? The right conduct of one toward the other in the union of the family, the village, the tribe, the community. But these

institutions presuppose in their meaning a specific order and a definitely regulated combination, and are dependent upon legal regulation. Right conduct, such as Dejoces decided, can not be conceived without norms of doing and forbearing. There must be *some* subject of intercourse if the question of the right conduct of the one or the other party is to have any meaning. There are certain definite activities which the one proposes to undertake and which the other opposes as tending to encroach upon him to his injury. And both of them necessarily appeal to a rule of external action which stands above them, and without the existence of which as a standard it would be impossible to determine the right limit in the advance of the one and the prevention of the other. The two parties in dispute were united in co-operation. They were intended to live and struggle together. The grievance of the plaintiff is that the party of the defendant acted contrary to the right manner of living in common, that he violated the right mode of social existence. But as a binding agreement on conduct can not be conceived except as a union under external rules regulating behavior, it is clear that every judicial discussion of *right* social action necessarily presupposes the historical regulating material, whose utilization in practice forms the subject of a judicial dispute.

It follows therefore that no one can be a just judge who has not at his disposal a positive law as the basis of the facts in the case, which the argument of his judgment endeavors to decide justly. The circumstances are the same in this case as they are in all other unifying insights of knowledge or volition. The subject matter must come from the outside, and the problem of the judge is to work up this material so as to bring about a just result. On the other hand, it is impossible in this case, without such material in the shape of an empirical positive law, to lay down with good reason any proposition that a specific mode of external conduct is objectively justified or not.

Justice in every case can apply only to materially conditioned volition, which presupposes concrete regulations and definitely laid down rules. But there can not be a true systematic judgment of particular cases of mutual conduct, whose specific content is unrelated to the underlying material of historical rules of law.

We can also without difficulty correct the inexactness in the above account of the Greek historian. I do not mean a correction of the historical facts about the kingdom of the Medes, concerning which we know as good as nothing with any certainty. What I mean is to correct the systematic explanation of those facts which is implied in the expressions of Herodotus. What was wanting among the Medes was not a positive law in general, but merely written statutes and clearly stated enactments of the law-creating power. The skillful judge, whose decisions delighted his people, understood how to decide with justice newly arising disputes, on the basis of the general principles of the traditional customary law. For we may assume that they also had such things as property, contract, paternal power, and some sort of specific law of inheritance. And the difficulties related to the manner of carrying them out in specific cases of dispute. To suppose that he performed the functions of his judicial office without any basis of positive institutions would be quite meaningless.

It has been supposed that the claim here made may perhaps be admitted for the period of human history lying behind us; but that the case is different as regards more developed ages. For these, it has been thought, such implicit ideas as are contained in positive institutions of traditional legal systems will gradually become superfluous. And that our aim might be to realize the one proposition, Be good in your conduct toward your fellow-man. This is a great illusion. But in order to prove this we must not confine ourselves to a mere generalization

from the experienced facts of history. This is what Luther himself attempted. "If any one should wish to rule the world according to the Gospel," he says, "by removing all temporal law as well as the sword, and assume that the people are all baptized Christians, among whom the Gospel desires neither law nor the sword, having no need thereof; what do you suppose, my friend, the result would be? The wild beasts would have their bands and their chains loosed to tear and bite everyone, on the assumption that they are fine beasts, and tame and gentle. But I would feel my wounds all the same."

But however true this may be for his time and our own too, it does not solve the theoretical problem presented by the above mentioned question. For those people are thinking of doing away with concrete statutory commands not as a practical legal proposition, but as an ideal aim; which may very well exist as a guiding star, even though there be no prospect of coming appreciably near to it in the future before us. The requirement of such a radical simplification would nevertheless have its practical significance. For the man who keeps it before him as an ideal aim would without doubt be influenced by it in his particular judgments and undertakings. But even if it had no practical effectiveness whatsoever *now*, the idea, as said before, would still remain of value as a standard of legal development.

The proper solution of the problem here presented is derived from the concept of justice and its application to law. It denotes a specific formal quality of positive law, and has no other function except that of endowing a historical legal material with a distinguishing quality. On the other hand, its verification does not at all mean a separation from the empirical material of positive law. To strike out the latter entirely, and simply to indicate that the questions of man's conduct toward his fellow must be determined justly, would be entirely meaningless.

The idea of objective justice is purely formal. It means simply that a definite legal volition is brought into agreement with the fundamental principle of all norms of conduct. If you take away the historical material of such specific legal volition, there is nothing to which the idea of a just legal content may be applied. And we must think of the comparison used by Kant in reference to metaphysics, "The light dove, dividing the air in her flight, may think that she would do still better in empty space."

This must not be confused with the question of the possibility of a relative simplification of the propositions of legal casuistry. In particular, one might think that a legal code would not undertake, by way of supplement, to give precise indications in the law of contracts of what would constitute justice in those cases which are not provided for in the given contract. In this case the regulations of the law of things, of family law and the law of inheritance, of the laws of debt and of public law, are presupposed. The contracting parties make use of all this in their specific union, and the dispute arises in carrying it out in the details of practice. Now whether the law lays down a ready-made opinion for this case — which would naturally be the correct decision — or whether it refers this problem in a general way to be treated in accordance with the principles of just law, is a question of the *means* of which a legislator may make use, and no longer pertains to the question of the *matter* of just law.

Finally there is this yet to be emphasized. Our problem of giving the character of justice to the content of the positive law must take all conceivable law into consideration. There is no legal volitional content with which as a principle our problem is incompetent to deal. The problem of making just law is co-extensive with the idea of law in its entirety and may be applied to it without leaving any remnant untouched in principle.

It may seem as if many discussions closely related to our question have been conducted with an opposite tendency, and deliberately so. We frequently find the distinction made between considering a matter from the point of view of "expediency" and deciding it according to "principles." But such a distinction is not calculated to clarify our leading ideas, nor is it altogether without danger. For we must bear in mind that the word "expediency" as a definite aim for a given volition may mean three different things.

1. Expediency may mean just law. The court or some other authority may be directed by the legislator to decide certain supposed cases in accordance with "expediency," without laying down in advance a specific law with its stringent limitations. Thus it is said that in administrative jurisdiction the decision should be made to a great extent on grounds of expediency rather than on those of the law. But this means nothing more than that the judgment desired shall be such as will adjust the interest of the parties in objectively just fashion. The first meaning of expediency refers therefore to the *means* of which the law makes use to carry out its final aim, and not to the introduction of a new aim that is provided with other qualities than those offered by the social ideal.

2. Expediency may mean *technical* consideration. This is a specially frequent use of the word. It contains the idea that in a special case it may be of advantage for the time being to take it out of the general idea of purposes and treat it by itself. We confine ourselves for the moment to a certain positive aim, and inquire in that connection for the attainment of that aim and the means suited to the purpose. This is found in almost all cases which concern the carrying out of proved and firmly established legal regulations — in questions relating to administrative officers, in the stamp and revenue laws, in the management of the conveyance records and registers,

and many other things. But in all these cases the necessary unity of purposes is forgotten for the moment only. The limit thus set may be set aside at any moment in favor of the general principle; and the general connection with the highest law of volition (which can only be one) may be re-established. The two kinds of standards which are here set up — expediency and justice — are not therefore of equal rank and co-ordinate. And it is not at all correct to divide the legal material in its concrete aspect in such a way that the first part shall belong exclusively to the one standard and the second to the other.

3. Expediency may mean *tactics* as a principle. This process is, objectively speaking, quite inadmissible. Here the attempt is made, in place of the justice of a volition (which can only be settled according to principles), to put before one some limited aims, for the attainment of which the process in question may be the most suitable means. But as these limited aims must again be looked upon necessarily as means to other ends in an uncompleted series, the further question, "Why"? can not be evaded by pointing to particular aims. Rather must every specific purpose, in its capacity of a means to further volition, form a number of a series leading methodically to an ideal ultimate aim, if it is to be objectively justified. But there are not two absolute final ends; nor are there two ways leading from the particular point to the central law. *Only one thing can be right in every given case. There are not two kinds of right.*

If a certain external mode of conduct is not justified by the principles of just law, it is not possible to justify it objectively on grounds of "expediency." The choice is unavoidable. One must either reduce all his efforts to mere unconnected particular aims which he follows from time to time. In that case he is, as an arrogant skeptic, in reality indifferent all the time. Or else he desires to be able to say that those things he would like to attain

are justified. In that case he must submit to the fundamental law of justice. The result of our discussion is therefore this. The matter of just law is the law as it has come down in history. But, on the other hand, all conceivable law is subject to the test of the idea of justice, and no legal question can escape it.

§ 3. *The so-called relations of life.* — In this last expression is at the same time indicated completely the material for the elaboration of just law. In this connection the problem is merely to form rightly the empirical legal content. And we must avoid the notion that positive law in turn must exercise a right influence upon the relations of life as something distinct. We must not picture to ourselves the social life of man as consisting on the one hand of relations of life as independent magnitudes, and on the other of bodies of law corresponding to them and having a causal influence upon them. Every social relation is so constituted that it embraces the rule as well as the co-operation; and these two can be looked upon as distinct by way of abstraction only. If therefore we shape the content of positive law in accordance with the principles of just law, we have accomplished all that can be done in this connection. For in doing this we shall have undertaken at the same time, as a natural consequence, the objectification of social life in general. The right determination of the form of social existence gives to this latter without further ado the quality of justice. And there is no peculiar object besides that must receive this quality from the law. The proof of these statements comes from a consideration of the fundamental social concepts.

Social consideration is a special mode of conceiving methodically and fundamentally the life and work of men in common. This common existence and intercourse may be considered *technically* or *socially*. We are now concerned with the latter only. If we think of social life and ask ourselves what idea this concept of the social

existence of men necessarily and universally contains, we find nothing else except the idea of *union*. Union is the peculiar and universal characteristic of social life. Fundamentally there are two kinds of union, that which results from the *natural attraction* of phenomena generally, and the union brought about by the *positive rules* of man. Now as our intention is to differentiate in principle social reflection from physical knowledge, it follows that the former represents the study of the life of men as one that is subject to *rule*.

Here, too, we must guard against the misunderstanding that there are two kinds of human co-operation, which may be distinguished by definite characteristics. And that the one group of common activities must be considered in *technical* fashion, while the other pertains to *social* study. This is not true. Every human act of co-operation may be looked at from either point of view. It may be determined technically as well as socially. Each of the two modes of study represents a distinct fundamental method of treating the same object. Each has therefore its own specific fundamental conditions, and its own unifying mode of procedure.

External rule is the logical condition of social conception, and is therefore in this sense the form of society. We must not look upon it as a wall which encloses a garden and protects and secures it from hostile attack, and at the same time perhaps confines it and prevents now and then its free management. To think of social rule and common conduct as two distinct bodies is a mistake. The true relation is that of condition and thing conditioned. The latter can not exist without the former as an object of social conception.

We can show this also by solving certain difficulties which have been cited as proof of the existence of "relations of life" as independent objects. It has been claimed that social relations which are only "matters of fact" are

found among other creatures and in the relations of men to the lower animals. But it is better to leave alone the question of the social life of animals or the relations of men to them because they are nothing more than a reflection of human society, the ideas of which have been carried over to the lower sphere of animal life. On the other hand, the social life of men can not be imagined without rules governing the conduct of the persons united ("Wirtschaft und Recht," §§ 18 ff.). This is true of social life as a whole as well as of certain particular social relations.

Some have characterized the status of betrothal as purely a relation of "fact," which must be unjustifiably removed before there can arise a legal relation. But this is not true. The status in question represents a family union, entailing the reciprocal obligation of true and faithful preparation for, and execution of, the marriage. And the betrothed couple are regarded and treated as socially united. It is therefore impossible to think of this union otherwise than as subject to the condition of legal norms.

The historical institution of slavery has also been placed among the "relations of life." But there is a confusion here no doubt, due to the fact that the relation of the master to the slave is regarded by itself. This is not correct. The institution in question denotes a legal relation among the masters of those human beings who are regarded as things. For the essence of slavery is the right to ownership in a human being. Such a right is possible only in consequence of certain external rules governing those united by them. This right must therefore be regarded as a real, legal relation, *i.e.* a relation determined by law between the person entitled and the whole number of those subject to the law.

Even the fantastic notion of a "war of all against all" as a historical condition, can not lead to the idea of "relations of life" as independent objects, furnishing the

social student a specific material for the law to control and to govern. For war, and the hostile relations among men generally, may be considered either as a natural act; as the struggle of animal natures which must be treated from the point of view of natural science; or it may be of social interest, exhibiting perhaps, on both sides, a certain degree of organization, or even rules for the declaration, management, and termination of the military campaign. A third method of viewing the struggle and the fight, a method that is neither scientific nor social, but, as they say, "factual," does not exist.

Others again have pointed, on the other hand, to the *common spiritual possession* as a basis of social "relations of life." But if there is nothing else than the simple circumstance that a person A has the same intellectual content as the person B has, or formerly had or will, perhaps, sometime have, we have in this circumstance nothing that goes beyond the mere summation of particular persons; we have no special subject of investigation. Life in common which can be truly called a "relation" can not be conceived without the idea of a mutual understanding and a regulation of the conduct of one to the other. And without this the idea of an independent social "relation of life" has no intelligible meaning.

Finally, many writers have referred to the *reciprocal influence* of man upon his fellow. But this is very vague and indefinite, and does not give us, any more than the others, a specific object of scientific investigation, such as the problem of social science demands. Reciprocal influence is found everywhere in nature. Hence it can not form a special characteristic of the *social* question. If this objection is answered by saying that the reciprocal influence to which allusion has been made is such as unites men together, then we are just at the beginning of the process of argument already completed above. For our question now is, Under what universal conditions

is such a union possible? and this leads us necessarily to the idea of an external rule.

There are therefore no social "relations of life" which are not conditioned by norms of conduct. Our inquiry here, in our social investigation, is concerning the relations which arise through union. The subject of our study is not now the particular individuals as such; nor is it their specific doing and dealing as a distinct thing, but the mutual relations, which when taken together as a unit constitute social life as a specific object. And these relations do not exist in contradistinction to the external rules, but they are created by the rules, and do not exist without them. And this must not be understood in the temporal sense, as a statement concerning their development in history. We are concerned with the logical relation of the elements in our mental concepts of objects, and not with their actual occurrence in life. We mean to say therefore that if we place on one side the conception of persons in isolation and on the other that of men united by external rules, there can not be an intermediate stage between the isolated existence and the social. This is not meant as a statement describing their historical development, but as a systematically established proposition. The opposition between isolated existence and social life as externally regulated co-operation, is absolute and exclusive. And this opposition holds true of every moment in the history of human existence.

§ 4. *Manner and custom.* — But does it necessarily follow that social relations must be governed by *legal* propositions? Can not we conceive of regulated relations under the guidance of manner and custom and other *conventional* norms? In which case we can still speak of a "relation of life," not indeed as an unregulated relation, but as one regulated by convention. This can not be denied. But in order to appreciate the full meaning of this conception we must call attention to the following considerations.

Conventional rules are an invitation to conduct oneself externally in a certain way, and their validity rests upon their being accepted by those addressed. They are external rules having nothing to do with the formation of right intention. They are valid if the subject is willing that they shall be, but they have not the sovereign authority to compel — a quality pertaining to legal propositions. They are developed as a rule in special narrowly defined circles of the population. Here they often exert, in their actual effect, an unusually heavy pressure upon the individual, which may be quite opposed to the real intent of their claim to validity. In distinguishing them conceptually from legal norms we are naturally interested only in their formal claim to validity, and not in their actual effects. Hence it follows that conventionally regulated conduct is devoid of the guarantee of permanence. Relations regulated in this way change from moment to moment; and it is only in a metaphorical way that we can speak of a conventional community. It is therefore a very fluid material that is here taken up by legal regulation. For this is the decisive matter at the present moment. Legal command possesses the quality of *sovereign* validity. It determines by itself the extent of its domain, as well as the class of persons subject to it. It is a compulsory rule and represents a force of a specific kind. To be sure, a law is not *valid* because there is force — this would be merely a natural condition. But neither is its validity exclusively dependent upon the intention of those who follow it. This belongs to the problem of *ethics*. The validity of a law consists in the fact that there is a power which has the formal quality of essential inviolability. Since, therefore, as we have seen, law has autocratic power, and denotes that social regulation which is sovereign and capable of comprehending the whole of social life — it follows from this that the conventional rules also, which appear merely as invitations, can occupy

only that place which is assigned and permitted to them by the law.

It may be that the law is silent on those matters and refuses to interfere. But in this very attitude there is a definite mode of "legal" regulation. The two groups of rules, the legal and the conventional, are not co-ordinate in value. They are of different rank, as measured by the strength of their claim to validity. Law can limit the conventional rule and take its place or leave it, but not the reverse; though we must remember again that we are not thinking of the actual results in a given case, but of the universal tendency as implied in its fundamental volition. If therefore the law leaves certain matters to the control of the conventional rules, it is with the necessary supposition that the content of the latter is identical with the principles of just law.

This statement, too, is not meant as a generalization from actual facts as observed in history; but as a systematic idea which is indispensable to the conception of a uniform principle, and makes possible the comprehension of law as an absolute unity. The actual way in which a certain custom originated; the specific motives which led a definite law to withdraw and leave the field free for the action of custom — this is quite a different question, which does not interest us here. It is a concrete investigation for itself, and can not acquire the rank of a universal knowledge even if generalized from the material of actual observation. For inasmuch as it regards the specific empirical material as essential, the only thing it can do by means of generalization is to extend and enlarge this material in a conditioned manner. But it can not in this way attain the unity of a formal law and its necessary conditions, which lies at the basis of scientific knowledge.

To return now to the relation between law and custom, we see from the above that so far as its claim to validity is concerned, the latter theoretically derives its sphere of

activity from the former. This is objectively justified so long as the conduct determined by the conventional rule agrees with the principles of just law. Thus the form of the law embraces the whole of social life, even though it tolerates the presence of external rules of another kind and assigns to them their place. The controlling principle of the whole, however, is the endeavor to build up a just community. This does not make the conventional rules legal propositions. For they lack the conceptual characteristic of sovereign authority. They are always nothing more than norms of a peculiar social nature. They are citizens of the second order, and are controlled in their claim to validity by the decisive and determining character of the law. Their material content must derive its justification from the principles of just law.

Positive law is therefore responsible for conventional rules also. And if an unjust and improper custom or conventional usage or rule is found in a society, this shows at the same time that there is unjust law. The rightness of custom must also be determined according to the principles of just law. There are no other principles of external conduct next to the law. And any toleration of an unjust conventional rule must be laid at the door of the positive law in force at the time. It follows therefore that, since the law determines for itself how far its dominion is to extend, the question of just law in all cases has no other material than that of positive law. For all regulation of conduct in human society ultimately goes back to this. It may investigate and determine also whether it shall tolerate this or that conventional rule; and whether it shall take up a specific matter or not. But in all cases the problem of just law has to do with the content of positive legal norms, and not with any other kind of relations which are supposed to exist as separate and independent magnitudes, such as, for example, the so-called conventional "conditions of life."

§ 5. *Social economy*. — We shall now, as a result of the above discussions, be able to make clear the relation which our method bears to that tendency of social investigation which has often been given the name of *ethical political economy*. It may be worth while to devote a few words to this matter, for it has been said by a good authority that the system of social idealism is perhaps nothing more than a particular application of the tendency just cited. This idea is erroneous.

It is clear at the outset that the idea of the social ideal and the doctrine of just law derived from it are more comprehensive than the tendency of the political economy above mentioned; and that it is concerned with more far-reaching problems. For the latter has to do only with the question of social politics; whereas the problem is really one of Justice in general, whether it appear in legislation, in the acts of the individual, in the advice of counsel, in administration or in the judicial judgment. And in reference to this more fundamental problem the method here proposed and the questions discussed are fundamentally different from those undertaken by the notorious academic socialism, especially in the ethical school of political economy.

This school conceives of social economy as an independent organism, in whose life and movement the State must interfere with its legal ordinances on ethical grounds. According to our theory social economy exists only as a state of co-operation, in whose definition is already implied the control of a certain external regulation. This conditioning form, accordingly, must be shaped in accordance with the law peculiar to it, and we must not appeal to an external institution, "ethics" for example, to determine for us the just content of the form of social life.

We have shown sufficiently in another place that social economy must be regarded as the matter of social life. In the concept of social existence are contained two

constituent elements, the regulation which determines conduct, and the social conduct itself. And it was emphasized there that these two elements never appear actually in separation; that they are merely abstract elements of the unitary concept. And these two elements — we may now add — are not of equal rank. It is not a division like that of property rights into real and personal. But the one element embraces the conditions under which the second — the conditioned and determined — can be conceived.

For this reason it is an error to suppose that rude and uncultivated states of society can not be treated by the same method of investigation. It is certainly possible to do so. And so far as our question and method are concerned, it makes no difference what degree of refinement a certain social group has or has not reached. It is erroneous to suppose that an uncut block of marble is fundamentally different from the work of the sculptor as regards this first question of method. The stone from the quarry also has its form. And the important point now is just this distinction of matter and form. But just as a block of marble can not exist without special form; just as it is certain that we can form no idea of a block, nor can we present a doctrine concerning it, which does not come under the condition of spatial determination — so the state of social co-operation can never be conceived as a special subject of investigation, in particular as the social material, except as regulated conduct ("Wirtschaft und Recht," §§ 34 ff.).

Accordingly when I separate the two elements of regulation and social conduct, the separation is an act of abstraction; I can make clear the separation as such in abstract idea only, but can never form an independent idea of the matter, the conditioned and determinable element. Of the form, as embracing the conditioning elements of an object, we have already shown in another place that it

is possible to give a complete and independent theory. But it is quite impossible to form an idea of the matter — the element conditioned by the other parts — without introducing again those formal conditions.

We must be careful not to take this division in a subjective or, as has been said, psychological sense; meaning by this that we forget for the time being that certain ideas are always combined with certain others. The process of abstraction must not be carried out as a temporary act. I mean that it is possible by careful and systematic thinking to separate the elements of a conscious content critically and permanently, and to arrange them according to their relative value as conditioning or conditioned.

If one has become familiar with this method, he will not be surprised to find that whenever we attempt to define the matter of a concept, we necessarily get a conception which may really denote the object itself. Thus I am quite certain that in the concept of co-operation are necessarily contained the two elements of which we spoke above. But when I try to determine what the *matter* of this thing is, I find again social conduct; and it is altogether impossible to form a clear idea of this without the aid of the idea of regulation. For it is agreed that it is not the sum of particular acts. It is rather a peculiar unity of association as regards the conduct of those united; and this can not be expressed without the implication of uniting rules. And yet the idea of matter as a constituent element must be something different from the whole; though we can not express this difference in a separate definition.

It is not true therefore that social economy exists as an independent thing, and that the State interferes in something which was there before without legal order. On the contrary, the former can exist only as legally regulated working in common. It follows from this that the problem of justice can not refer directly to social economy. The positive law stands between them — the positive law,

which is the condition of the former in its work of co-operation. Accordingly the concepts, *matter of social life* and *material of just law*, must be kept distinct. The former denotes social economy which is carried on under the condition of a positive law. The latter is this positive law itself, which is now submitted to an objective rectification in the sense of its own regularity.

CHAPTER FOUR

THE MEANS OF JUST LAW

§ 1. Economic unity and free contributions. § 2. Justice and leniency. § 3. Actual and formal Law. § 4. Consicously unjust Law. § 5. Lacunae in the Law.

§ 1. *Economic unity and free contributions.* — By “means” of just law we understand in the present connection certain measures of positive law. We are not now concerned with the method itself by which we form and establish a critical judgment concerning the justice of a law, but with the means employed by the legislative power for carrying out in practice the law recognized as just. Our method enables us conclusively to decide in a given case what the just law is. The situation to be judged and the question it presents are furnished by social experience. The former arises with the help and upon the basis of the law actually in force. The second need cause us no concern, as it is always bound to appear, in the form of a dispute or at least as a question demanding an answer. All this we assume as given, as also the possibility of a satisfactory answer. But as just law is nothing else than a specific kind of positive law, the latter must always endeavor to retain the quality of justice. And the question now is, What general ways and means can be distinguished in such endeavor? In answer we may say that there are two alternatives running parallel to each other.

1. The law may regulate the work of co-operation by means of direct instructions issuing from a central point; or it may leave the individual free to determine for him-

self the manner of his contribution toward the building up and support of society.

2. The legislator himself may attempt to conceive and lay down a specific principle for the right decision of a case in dispute; or he may leave it to those interested to search and to find the just norm in a given case of law.

Let us first examine more closely the first pair of alternatives and consider the second choice. A certain tendency in the literature of political science has endeavored to find the limits within which the power of the State may rightly restrict the freedom of the individual. The answer that is given is in general this, that no other interference in the private affairs of the individual is permitted than such as is required to secure the State against internal and external enemies. Others have opposed this view and have tried to prove casuistically that the above postulate can not give a satisfactory solution. Their opinion is that every person entitled, above all the owner of property, must have regard for society, which is his partner and demands a share in all that the individual has.

The latter view is especially defended by Ihering, who aims his discussion particularly against W. Humboldt and Stuart Mill. He shows the absurdity of carrying out the idea of property to its ultimate limits, and maintains that absolute freedom of action must lead to bad results. At the same time, however, he ends up with a doubt whether we shall ever succeed in indicating how far the State should interfere in the affairs of the individual. The endeavor of the others, he says, is like steering on a rock to force a passage; and for this reason Ihering holds back because he has no hope of the possibility of getting through. We have reached, he says, "the pillars of Hercules, where science must halt."

The ingenious writer, as is his wont, has *felt* the right thing and was not afraid, despite the traditional opinions, to give expression to his idea in descriptive fashion. To

be sure, the descriptive method and the casuistic argument necessarily prevented the solution of the problem, which, as he himself confesses, he has not found. The *critical* method was unknown to him. This method alone shows us in two ways why the conception and treatment of our problem by the authors just cited was not correct.

(a) It is methodically incorrect to think of the social existence of men as an agglomeration of particular individuals, in whose natural freedom the State forcibly interferes. Our critical analysis has shown us that social investigation is logically conditioned by external regulation as the condition of the concept "society." It is therefore not sufficient to point to the fact that a private right "not limited" by the State force must necessarily lead to undesirable results in actual experience. The truth is that the entire conception of the right of property, for example, without the idea of a legal regulation constitutive thereof, is a non-existent thing. In social investigation there is no such thing as "natural freedom."

(b) It is now clear why the endeavor to lay down a fixed limit, in the meaning of the writers above mentioned, was bound to fail — they were looking for a concrete answer *with empirically conditioned content*. They wanted to determine what concrete ordinances of the State were justified and what were not. And the one liked to maintain the owner's absolute power of disposition as a just law, while the other thought that certain restrictions were desirable. And they debate the matter in generalizing fashion. Instead of taking a state of affairs actually given and considering it by means of an absolute method, they speak of justified laws without reference to the conditioned material of the law. It follows from this that there is indeed a universal solution of the problem, which those men, too, indirectly were investigating. The limit they were looking for is determined in every case by *the principles of just law*. But there are various *means* of which

positive law makes use in order to acquire and possess a just content. Every law finds certain social phenomena before it. These must be observed, explained, and tried by the method of just law; and then they must be so directed that they may in every case be improved in accordance with the idea of just law and its principles. But it is always an open question which one of those means is calculated to direct and determine the actual facts of this society in the sense of a good social life. The social ideal alone, and the method of its application, are universal; the material and its improvement are always changing.

As a rule it may be said that in those norms which aim at maintaining and carrying out a social community, centralization can more easily and more firmly be established than in those relations which are immediately concerned with the activities of men for the satisfaction of their wants. The former involve the idea of the State, and form the nobility so to speak among the rules of the law; but they also involve, above all, all immediate contributions of the members which make possible a uniform policy in foreign affairs as well as a harmonious administration of affairs at home. The first objects of a centralized government are an armed force against foreign powers, and authoritative officials for the improvement of the law and for protection against its violation. But it has other problems besides, such as union in labor and trade as against other communities, as well as a united front in its dealings with other united groups of people. And as the particular individual — an abstract concept which has never appeared nor ever will appear in actual life; — as every man in cultivating and perfecting all his talents and abilities, is inevitably dependent upon the sources which flow from the bosom of social existence, there will come a time in the regular course of progress when the idea of a *community of culture and education* will lead to uniform

regulation in this element of social life also, which stands higher in rank than the others.

On the other hand, as it has been found technically advantageous to differentiate the work of the social economy, it followed as a matter of course that each individual was given freedom to choose his own occupation. For this is a matter of confidence. And where there exists an association of men acting in unison, the activities of the individual members will soon divide themselves into classes and each will contribute his definite share to the whole.

In a small community it is possible to go further; and the members may live so intimately together that mutual confidence and freedom to determine one's own activity are mostly advantageous to the interests of the whole. But it can not be maintained with equal certainty that the same holds good of the larger numbers of a great State. Here the individual citizens are personally perfect strangers to each other, and the legal bond alone holds them together. In this way arises the erroneous opinion that outside of the positive law actually in force one need have no concern about the persons united by this law. Nay, there is even formed the idea of a possible struggle for existence within the legal union and among the members themselves; whereas in truth there should be only a common fight and a common struggle against the hindrances and defects of the conditions of human life. People forget that even where the individual member of society is given freedom to act as he will, we have an instance of the law's confidence that he will do his right share of the work. The freedom thus granted is only a means for effecting a good social life; and every one does wrong if he regards this means as the highest law of his conduct and as a permission in principle to regulate his behavior as he arbitrarily chooses.

Accordingly the means of the law must be pushed and moved about and variously managed and handled by the

latter in its desire to realize justice. And it will scarcely ever be possible to dispense with either one of these means and make exclusive use of the other in any period of human history. For in economic unity the personality of man often gets less than its due; while the free contribution which the individual brings may easily detract from the justice of the whole. Therefore the two kinds of means mentioned above will always, so far as human vision can foresee, have to play their rôle together. And it is only in each particular case that we can choose and say that economic unity or free contribution represents the process which is calculated to produce just law.

§ 2. *Justice and leniency.* — A legal proposition is just when it endeavors firmly to determine beforehand in universal fashion what is right in cases that may come up for decision. As a result of experience the legislator is aware of the fact that a possible doubt may arise in specific legal situations, and attempts to supply a safe and decisive norm stated in universal terms to be applied in those cases.

A lenient law is one that does not formulate in advance a fixed proposition to be applied to a particular question that may come up for decision, but one that empowers the parties in dispute, the attorney, or the judge to find the right rule for themselves. Like the first it is based upon the historical material of definite positive law; but in the present instance it does not present ready-made a general statute, but bids the parties concerned to search for the right rule themselves.

In the first case when one wishes to subsume a particular matter of doubt under a general rule, he need go back only to the proposition formulated by the legislator. This technically formed proposition forms the highest point and the basis of discussion. In the second case if we wish to find the law that is decisive, we must go all the way back to the fundamental aim of law in general; and the decision

must be derived by an unbroken chain of reasoning from this fundamental principle.

In this second case we must not say that the matter must be decided "according to" the actual conditions of the particular case. For this would be to confuse the material to be judged with the general principle supplying the decision. The specific circumstances of the concrete case must indeed always be taken into account; but they form the subject matter that is to be decided and not the court which hands down the decisive information. The latter may vary. It may be represented by a firmly articulated paragraph of positive law, or it may be furnished by the principles of just law.

This distinction, as is well known, goes back to Aristotle. In the fifth book of his *Ethics* he speaks of the two things as *δικαιοσύνη* and *ἐπιείκεια*, and gives a precise definition of them in outline. The German translation of the second word, which we use here ("Gelindigkeit" = clemency), comes from Luther, who makes use of it in the New Testament to represent the Greek technical term. It can not be replaced by the other expressions that have been proposed, such as "gentle," "fair" or "kind." The manner in which the Romans distinguish between "strictum ius" and "bona fides" does not denote any advance in the recognition that we are dealing here with two fundamentally co-ordinate means in the service of just law. They combined it entirely with the peculiarities of their procedural institutions. The distinction here developed is found there also, to be sure; but it is overshadowed by the technical accessories of judicial procedure. And it is even truer in this case than in the objective judgments of the classical jurists, of which we spoke above, that the methodical insight into the real significance of that distinction was missed by them. We must now investigate the real difference between the two means mentioned.

We must remember above all that when we speak of a

“lenient” law we are also dealing with a specific kind of positive law. The expression denotes a peculiar means employed by the legislator for the maintenance of just law. And where he refers to it, it is a question of a legal norm which must be made plain. And the deciding vote is given by the fundamental principle of law itself. But we must not by any means think of them as ready-made rules coming from the outside and (no matter how or where formed) standing in contrast to positive law as propositions of a peculiar kind.

“*Leniency*” must be regarded as a formal quality of the content of a legal regulation. It applies to all those subject to the law, who are required by the latter to conduct themselves rightly — whether they be the subjects or the judge. It may be admitted that there are many who, in thought, go somewhat further; as, for example, when the apostle admonishes the slaves to give willing obedience equally to the “gentle master” as to the “strict.” Here we may think of the completeness and perfection which is formed by the addition of good inward intention; when with the knowledge of right conduct is associated the absolute devotion to right and justice. But in our present discussion we only speak of leniency as a means of legal order simply, and as contrasted with the other resource, namely Justice.

If we consider now that other method of legislation in which universal propositions are laid down directly, determining in advance what is just, we have again two further subdivisions.

(a) *Technically* speaking, such formulation may be *abstract* or *casuistic*. This is a question relating to the mode of expression of legislative ideas. The division is relative, and the boundary line fluid and not fixed. The second mode of expression, namely the *casuistic*, is more closely joined to the particular facts to be decided, and takes over from the latter certain specific elements of

the cases that come up for judgment. It follows that the closer the connection between the legal rules and the particular facts, the greater must be the number of the specific elements embodied in the former. In the abstract mode of expression such specific facts are in a great measure left out of the general rules of law. And the further the legislator proceeds in this direction the more abstract his expression becomes. But, as we said before, these two methods are not differentiated by a definite conceptual characteristic, but only by the number of factual elements which are included or excluded in the formulation of the rule of law.

(b) *Materially* speaking, the law may lay down for definite facts rigid regulations as *final*, or it may permit its rules to be relaxed in particular cases. The former are binding and unalterable. The latter are intended as the law's instructions for ordinary cases; but the law admits, nay it suggests, that in a particular case it must be supplemented and perhaps modified in accordance with objective justice, *i.e.* in accordance with the demands of the fundamental idea of law itself. This distinction must not be confused with that of compulsory and supplementary law in reference to private transactions. The latter will be taken up in the following book when we treat of the interpretation of law. Similarly the question of the actual application of the distinction spoken of will find its place in our treatment of the practice of just law. For the present our intention is merely to point to this distinction as representing the various possible means legislation has at its disposal.

The two kinds of means which we have characterized as *just* law and *lenient* law may be utilized from time to time in the two groups of legal regulation discussed in the section preceding this one, *viz.* economic unity and free contribution of the individuals. But it is clear that they will play their main rôle in the freely formed legal regula-

tions in which those contributions of the individual take place. When a certain process of social economy becomes centralized, the probable consequence is that the legal ordinance referring to this matter formulates its content in a positive and general manner, and little room is left for a free searching for the proper decision of particular questions according to the principles of just law. Still, all this holds only in a relative manner; and for the formal distinction of the means it is of no particular consequence.

This distinction of the means is indispensable in law; and the latter can not get along exclusively with the one or the other if it is to do justice to its fundamental task. For on the one hand it is, as we said before, altogether out of the question that the law should content itself merely with pointing to what in every case would be just. This would mean to neglect the conditioned material of legal ordinances as they develop actually in history; and this, as was shown above, can not be done. But neither will it do, on the other hand, to choose simply the other means, namely that the law-creating authority should formulate of his own accord rigid laws as final, for in that case he would satisfy very imperfectly the fundamental idea of law as the attempt to effect justice.

When the legislator follows the second method, that is when he undertakes to work out and formulate by himself right norms, he must necessarily take his propositions from previous experience. He will have to draw the occasion for his rules from the manner in which social life has shaped itself; and the aims of future conduct will have to be determined in the same way. But as the specific possibilities of social action are necessarily conditional and therefore variable and subject to multiplication, it is altogether out of the question to comprehend and properly to decide the totality of all conceivable legal questions by means of a regulation proceeding from empirically develop-

ing phenomena. This would be to assign the character of absolute justice to the conditional volition of the legislator.

And this limitation can never be avoided. In technical legal science Paulus has long ago expressed his warning: "Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum" (D. L 17, 1). There the danger is that in striving after *technical* unity one may place too much confidence in the success expected. Here it is a question of *objective* unity, and hence it is even less appropriate here to hope to attain absolute completeness with *materially conditioned* rules. No progress, however great, in the art of finding and forming legal norms is capable of offering in advance the whole of just law. In the present as well as for the future the legislator's own expression of the law can properly apply only to the average number of cases; outside of which in all directions there are facts which are not properly met by the law in question so far as the demand of just law is concerned. In this connection Göschel is quite right in his remark that "The thing which makes the vocation of the lawyer so difficult is nothing else than the fact that in every right there is a small spark of wrong, and in every wrong a small spark of right."

In many cases the legislator can express more precisely the actual content of his will by formulating the rule himself. To be sure, every lawyer knows that it is extremely difficult to attain certainty in this matter; and that the subsumption of a particular case under the general rule of the technically formed law is subject to unavoidable difficulties and can scarcely be accomplished in a convincing manner. At the same time it is true that the law can attain to comparatively greater clearness in the ex-

pression of its specific volition in many cases by the legislator himself fixing the rule in advance. But unfortunately this formalistic certainty is only too frequently and easily obtained at the expense of objective justice. Only a limited portion of all possible facts can be properly covered, so far as inner justice is concerned, by the formalistically conditioned norm; the latter can justly apply to the average number of cases only. But there are other cases of a specific character which can not be so manipulated that the decision according to the rule shall at the same time satisfy just law.

This is shown with especial clearness in the statutory rules governing the form of acts in the law. Their introduction will, as a general rule, make more certain the will manifested in the juristic act; and will show more clearly the 'whether' and the 'how' of the intended obligation. But it has long been observed how easily this is done at the expense of objective justice; or, as we should say, in a manner prejudicial to *just law*. We shall come back to this in detail in the section treating of "ethical duty" according to the Code.

The inequality between technical certainty and objective justice shows itself with peculiar clearness in the question just discussed and in all other rules covering the average case, rules that have been called "practicable." But the law has also attempted to avoid the inequality just mentioned that is due to the changeable character of the actual conditions of a technically formed rule. This was done by the peculiar activity of the Roman praetors, who had the authority, in virtue of their "imperium," to depart in their official function from the possibly rigid command of the traditional "ius civile." In modern times we are less inclined to such ideas. The possibility which we now have of making conscious and deliberate use of the second means here spoken of, namely of immediate reference to *just law*, makes it seem less desirable than

formerly to have recourse to such extraordinary forms of changing the law. Nevertheless the same idea is utilized in less conspicuous form when a statute provides that its specific application in practice may be carried out by means of (possibly varying) "ordinances."

It is the business of the legislative power to study the existing social phenomena and as a result of this study to decide what means it should use for the purpose of attaining just law. They will have to observe the ability of the individual citizens and of the persons who are called upon to adjust their business affairs, to see what skill and practice they have in deriving just law from its principles. And they must also observe how widespread and how strong is the good will of the people to have justice, and what help may be expected for its realization from ethics. Where such ability and power is wanting or where it shows itself very weak, it is not to be wondered at if the powers that be hesitate to refer directly to "lenient" law.

But this second means must not be dispensed with, nor must it be too far repressed. We leave it to a later discussion to decide whether for example this has not been the case to a great extent in modern criminal law. The constant fear and painful memory of the arbitrary abuse of former times has led to the formation of the rigid and inflexible proposition that nothing but the technically formed rule of law can warrant the infliction of criminal punishment. And this part of our law runs as a strange parallel alongside of the freely progressing civil law. There is a necessity of carefully considering the scope of the one and the other of the two means of just law described. If the attempt to lay down general rules on the part of the legislator in his endeavor to secure justice is carried too far, the resulting state of affairs will scarcely be a happy one. "*Plurimae leges, pessima civitas.*"

§ 3. *Actual and formal law.* — This distinction is different from that of lenient and just law. It consists in

the fact that the law sometimes lays down certain general conditions determining the existence or the carrying out of a certain legal relation; so that a claim originally recognized by the positive law may be prevented from being realized. In the distinction which we considered above, the point of the difficulty was that the positive law, appearing as it does in general terms determined in advance, runs the risk in special cases of missing the law of *justice*. The point we are making at present is that the positive law, in the interest of formalistic certainty, prescribes such limitations for the particular carrying out of the law that there is the possibility in specific cases of failing to realize the intention of the positive law itself as expressed in other propositions. There the desire for technical certainty ignored the possible conflict between *positive* and *just* law. Here there is the possibility of opposition in the positive law itself, without reference to the objective character of the content.

This is illustrated in a peculiar way in the public confidence that is placed in the land register and the other official registers. Our legislation does not, indeed, endow the items entered upon these registers with formal legal force. It remains in fact an open question whether the content of the land register, for example, would really appear on closer investigation to correspond to that of the positive law. Still there is a legal presumption in its favor until the true legal situation is established in a better way. And in consequence of this the actual law may suffer injury, though formal security is thereby considerably increased.

A stronger illustration than the preceding one is the institution of *prescription*, as well as the application of extinctive prescription in specifically technical manner. If one does not assert his right within a certain period of time, "he abandons his right," as the law itself has it. Here the idea seems clearly involved that the important

thing above all is to have formal certainty, and the reasons for it have often been discussed. The difficulty of retaining sufficiently clear information concerning the legal status of past times; the disadvantage of uncertainty and suspense which lasts too long and may continue without end; the desire to punish laxity and unnecessary procrastination in the settlement of affairs pending; the habit of mankind, which easily leads them to desire the continuance of that to which they are accustomed — such grounds as these are responsible for the *formal* law of prescription. The development of this institution in civil and public law, especially the application to which it has been put in criminal law, and the manner in which the underlying idea has been most precisely expressed in the “*praescriptio immemorialis*” of the common law — this is so well known to every one trained in the law that it is not necessary to enter upon it here. But we also know that Roman law recognized extinctive prescription very gradually and hesitatingly. And while the older German laws were more favorably inclined to it and borrowed the institution of “*usucapio*” from the Romans, nevertheless they always accompanied it with the popular saying, “A hundred years’ wrong does not make an hour’s right.”

But the difference between actual and formal law is especially visible in *procedure*, in the judicial effectuation of given rights. This is implied at once in the idea of a regulation of judicial procedure. Whereas this is at first intended merely as *a means to the means of legal purposes*, it becomes again a technical end in itself, whose *raison d’être* consists in the avoidance of uncertainty and arbitrary change in the conduct of the parties concerned. Medieval jurisprudence went furthest in this matter. The principle of order dating from that time, according to which a judicial process is divided into fixed sections to be settled in a given order, as a rule irreversible and invariable, offers in connection with the “*Eventualma-*

xime"* a good example of a historical victory of formal law. Modern development, however, has not failed to react against it. Procedural law also came to be aware of its quality as a means in the service of ends. Those "principles" and "maxims" of common civil procedure have become obsolete. And the institution of "statutory means of proof," which does not allow the judge to make up his mind concerning the facts in a given dispute except under certain generally determined circumstances, has shrunk considerably. To be sure, the myth of the judicial necessity of two classic witnesses is still alive in many quarters; and the alleged distinction between being "convinced" of a fact and "proving" it is still widespread today. In truth, however, it can not be denied that there is in this respect considerable progress from *formal* to *actual* law.

But formal law is still triumphant now as ever in the *principle of party presentation* of our civil procedure. The judge is restricted to the adduction (of allegation or proof) and propositions of the parties. As an official his function is not to find out the truth, but to establish what has been proved of the assertions on both sides. The nature of the *technical* problem here presented is thus seen in precise outline; and its narrow and restricted character has many a time dampened the joy of the thoughtful practitioner in his work.

The contrast of which we are speaking is especially great when we consider the influence exerted by a procedural dispute, while the case is pending as well as after judgment, upon the existence and realization of the law involved in the action. In the first case, *i.e.* in reference to the significance of a pending action for *actual* law, legislation has honestly endeavored to attain objective justice. It aims

* [A procedural principle requiring a party to state all his pleas and defences, dilatory and peremptory, in his answer, and barring all later defences and pleas not thus stated in the first place.]

to protect the plaintiff from the damage which he is liable to suffer from a long drawn out suit — “*ex aequitate fructus post acceptum iudicium percipiendos praestandos*” (D. XXII 1, 38, 7). And at the same time the defendant is not made responsible for having undertaken in good faith the judicial conflict. In this way arise the often complicated regulations endeavoring to reconcile the right results of *actual* law with the *formal* necessity of postponement due to the lawsuit. But the case is different as regards the legal force of a judgment. Here the fundamental principle is still valid, “*Res iudicata pro veritate habetur*” (D. L 17, 207). This has given rise not merely to unsuspected *technical* difficulties, which have led to the still unsettled doctrine of the force of a judgment; but it has led again and again to evil consequences of a *material* nature.

There seems, indeed, no way out here. “For it is a law of necessity for the sake of human peace; according to which law a thing that has once been declared to be true and right must remain once for all formal truth and formal right. . . . Every one remains free to entertain his own opinion concerning the actual right, if he is not convinced by the formal. But no one pays attention to that.” And the same sentiment, quoted here from Justus Möser, has been expressed by many others. But we can not fail to remember, on the other hand, the indignant language used by Voltaire when he undertook an unceasing fight against the “*res iudicata*,” lasting many years. Jean Calas was accused of having murdered his son because the latter wanted to embrace Catholicism. The truth was that the son committed suicide. But there was an undercurrent of fanatical prejudice in the trial of the case against the young man’s relatives. The parliament of Toulouse declared them guilty, and the execution of the father followed as a result. It was then that Voltaire spoke the harsh word that, “Forms have been invented in order to

ruin the innocent." He succeeded in having the case retried; and the name of the dead father, whose innocence was now established in a just judgment, received a tardy vindication.

It is interesting enough to observe that the law has not infrequently found it necessary to carry out a second reaction against itself. First it attempts to lay down average justice in advance by means of general determinations. Then it limits this average justice in certain situations in order to increase the formal certainty, with a keener eye for the average case even than before. Finally it feels obliged partly to break through the second amendment also in order not to obscure altogether unjustly the actual law as at first laid down.

It is with this object in view that the Romans created "in integrum restitutio" (D. IV 4, 24, 1; XXVII 3, 20), of which we spoke above when we treated of *Grace* as a correction of positive law (cf. also D. IX 4, 30); and for the same purpose they used the "ius postliminii, — quod naturali aequitate introductum est" (D. XLIX 15, 19 pr.). In the same way we also have a provision for the reopening of a case in civil and criminal procedure; and make use, especially in the first, of an action of nullification and of restitution against conclusive judgments. This idea appears especially in allowing a claim of *unjust* enrichment, which provides for the restitution of that which has come into the possession of a person "sine iusta causa" as a *result of a legal judgment*; so that, as Windscheid has said, "The enrichment is *formally* justified, but not *materially*" (cf. D. XII 1, 32; XII 6, 66).

It is clear from the above that the means of *formal* law can serve a useful purpose in justice, with strong reservation only. Feuerbach is certainly correct when he says that "In order that there may be a condition of law among men, the law must be *certain*." But the means applied for this purpose must not rise to the superior

position of a sovereign statute. And it is only when there is actual danger of overwhelming confusion in the given situation, that it may be justifiable to prefer external certainty to mere obedience to the actual law.

§ 4. *Consciously unjust law.* — In many cases the legislative power must go further and help realize a certain legal content of which all it can say is that it does not deserve the name of just. Its injustice is clear enough, but we are powerless to put any other just law in its place. Here are a few examples.

In the German Protectorates domestic slavery is still maintained for the natives and it has not so far been possible to abolish this unjust regulation, for fear that such an attempt might result in complete failure (still to be seen in the ordinance of the Imperial Chancellor of November 29, 1901). Similarly the law tolerates among us private unchastity and prostitution because it is unable effectively to counteract these things by prohibition. Horrible intimidation is sometimes indispensable in war to guard against a greater evil. Thus a village is laid in ashes when the inhabitants shoot at our passing troops from ambush; and innocent men must pay the penalty along with the guilty for the deed of the unknown person. We do not always prosecute a crime committed in a foreign country, even if it was committed by a German and against a German, for the reason that it is not possible to rely with any certainty on the necessary evidence, particularly the required witnesses. Games of chance are in every case objectionable, because they throw contempt upon the products of human industry by squandering that which represents the standard of value of these products, namely money, and thus reducing the workers to instruments of the subjective moods of the player. And yet the States establish their own lotteries, thus encouraging within narrow limits the gambling fiend, in order that the vicious inclinations may at least have an outlet that is subject to

control, and the profits may be applied to the general welfare.

It would be an error to suppose that in such cases "practicability" is a new principle alongside of justice. The facts are these. In the cases just mentioned an attempt to indicate with certainty what would be the right thing has not met with any kind of success. All that has been recognized so far is that there is injustice. It is not true therefore to say, a particular measure is just but impracticable; but on the contrary, because the measure can not be carried out, its justice is not really clear. The law in its striving and desire for justice has no other mode of judging except as dictated by the principles of just law.

It is one thing to recognize that a given will-content is unjustified; it is quite a different thing to put something better in its place. In the cases above mentioned there are various reasons making it impossible to realize justice. Sometimes it is the preponderance of unjust desires in the masses of the people subject to law; sometimes it is the powerlessness of the State to enforce its will; and sometimes too it is the lack of ready organs of legal force, which leads us to give up in resignation the idea of attaining justice in a given case. And while we cannot justify our procedure in principle, we manage to excuse it relatively in a given case by the consideration that it is better in obedience to necessity to sacrifice a particular cause for once, than to jeopardize the idea of the law as a compulsory and inviolable regulation and thus "to trouble the source of the law itself."

§ 5. *Lacunae in the law.* — One effective means employed by the law for making its content just, a means that has repeatedly been tried and is often found to be indispensable, is *silence*. When it is employed it gives rise to difficulties in legal theory and practice that have often been recognized under the problem of *lacunae in the law*. We wish to investigate the place to be assigned to this ques-

tion in our discussion, and the manner in which it can be solved. And we lay down as our theme the proposition, There are "gaps" if we consider a *specific formulation* of the positive law. But there are no gaps if our problem is to decide what in a given case conforms to *law in general*.

The first can not be doubted. Particularly interesting for the technic of modern law are those cases in which the legislator definitely decides certain specific questions in accordance with a certain theory, and leaves to the lawyer to work out the theory and settle the various questions arising therefrom. Examples are, alternative performance (BGB. 364), joint possession (BGB. 866), liability of principal for act of employees according to the German civil law (BGB. 278; 831), and particularly matters concerning international private law (EG. 7-31). In those cases legal theory has to show how far those particular determinations of the technically formed law extend; and it must endeavor to work out a desired legal proposition according to those determinations in such a way that it will exhibit the meaning of this *specific* positive law.

We may think of those friends who found among the remains of an ancient tombstone in the Roman Campagna a heap of loose stones of a mosaic which had formerly adorned the floor of the grave. A discussion arose concerning the scene represented by the stones in their combination. "In the meantime a third person who had been sitting quietly took out his sketchbook and drew a proud four-horse chariot with panting steeds and racers and many beautiful Ionic ornamentations round about. He had perceived in a corner of the floor some insignificant remains of the ancient figure, horses' feet and fragments of a chariot wheel. Thereupon the whole stood clearly before his mind and he sketched it with bold strokes . . ."

But it is not our purpose to take up the technical application of the process, nor to introduce the doctrine of analogy. Our problem so far is merely to discuss the

logical relation of the ideas involved in this matter. The activity of the lawyer just mentioned, namely the completion of a defectively formulated law in accordance with its own specific intention, must necessarily come to a limit beyond which it can accomplish nothing further. This has been disputed, as is well known; and it has been maintained that the problem just mentioned has a "logical" completeness of its own. But this needs correction. For we must remember that we are dealing here with the possibility of completing the deficiencies in the spirit of the law *as specific in kind and conditioned in content*. Of this peculiarly limited content of a definite positive law we can not rightly maintain that in its concrete character it can embrace in absolute fashion all conceivable legal questions. This can hold true only of the fundamental idea of law in general, but not of the materially determined content of a particular legislation. Here the extension and analogy have their empirical limits. Thereafter if we wish to solve a specific legal problem, we must follow the second method. The legislator himself can not give us a decision in the form of a specific rule; whether it be one specially formed by himself, or one that is formed by a technical analogical inference from one so formed. Since, however, we *must* go further, our required norm must be sought in the meaning of *just law*.

From the standpoint of the latter the law is without defect. For when thought of in this way, it is simply a *method* for the working up of the existing material. And this method, as a formal doctrine, is, as a matter of course, universal and without defect. The necessity of going back to it follows from the fundamental idea of law as an endeavor to realize *justice* by force. Even where its limited content is not adequate to decide a specific question, there still remains that endeavor after the universal aim of justice. It is this which binds together as their immovable foundation the often rigid points of the posi-

tive statutes. And it is this firm basis that enables them to rise on high, often to such great elevations and in such peculiarly distinct forms that the observer forgets for the moment the granite foundation which bears those particular points.

It follows from this that the difference between the legislator referring the parties to the independent consideration and study of the "lenient" law, and his making use of *silence* as a means, is this. In the first case the parties concerned must treat the given material outright in accordance with the principles of *just law*; whereas in the second case they must first see whether it is not possible to find a decision in accordance with the meaning of the concrete content of this specific law. And only when this can not be done are they obliged to settle the matter according to the fundamental idea of law.

Finally we must again call attention to the fact that it is not a question of importing decisive propositions from elsewhere for the settlement of legal cases. The making good of the law's deficiency is not to be achieved either by morality or by an ideal law or by any other foreign court of appeal whatever. In case of the law's silence we must go back to the fundamental principle of the law itself, if the positive law can not solve our problem. And the thing we wish to make clear here is simply this, that there is a point where we *must* refer to the idea of just law. It is never possible to comprehend with absolute completeness all conceivable legal questions by means of the conditioned content of positive legal rules and the inference that can be made from their limited meaning.

CHAPTER FIVE

THE MODEL OF JUST LAW

§ 1. Methodical and practical model. § 2. The special community. § 3. Who is my neighbor? § 4. Types of performance. § 5. Descent to particular questions.

§ 1. *Methodical and practical model.* — The principles of just law do not contain in their idea and form anything of the specific content of positive law. They emanate from the idea of just law, which they are intended to realize and make supreme. Since the idea of just law itself, from which they are immediately derived, is found by critical reflection upon the possibility of a unitary comprehension of all empirical legal material, the principles themselves can only guide our thought in the working up of this material. But as they contain absolutely nothing in themselves that would constitute the peculiarity of a definite historical law and would not apply to the concrete content of other historical legal norms; as, on the contrary, their validity is absolutely universal and applicable to all law, they can not in themselves take up directly and immediately the manifold and concrete legal material and work it up in accordance with their idea. They form a necessary step in our progress from the concept of the social ideal to the historical regulations of law; but they can not of themselves take hold of the latter in their scattered and manifold and confused condition, and subordinate them with adequate sureness. The empirical material of legal regulations must first be brought together by an appropriate method and then laid before the judgment of the

principles of just law. This unitary method of subsuming doubtful questions of right conduct under the social ideal and its principles I call the *model of just law*.

The principles of just law are universal propositions which start from the highest point of the absolute idea of law and bring its commands down to earth and divide and distribute them; whereas it is the function of the model of just law to come up to meet them from below. Its business is to gather in unitary fashion the conditioned material of legal experience and lay it before the plenipotentiaries of the absolute monarch — the idea of just law. We have therefore four steps in the finding of just law.

1. The social ideal.
2. The principles of just law.
3. The model of just law.
4. Correct judgment in particular cases.

Before presenting the formula of this model and following up its activity in detail, I wish to remark that we find a parallel to it in the technical working up of positive legal material. We can make a distinction between the methodical scheme of just law and the types of positive law.

The latter are found wherever legal propositions appear in the form of a universal norm of abstract character. They lay down in advance comprehensive considerations of possible empirical material which has to be subordinated to the abstract proposition. Their appearance is therefore accidental; and the extent of their use and application depends upon the quality of legal norms above mentioned, as well as upon the state of legal science and the experience in things legal obtaining at the time. We shall take by way of illustration a few isolated examples from our study of Roman law.

The law says that if a party refers to the life or death of any one he must be able to prove that that person is alive or dead, as the case may be. In reply to this, legal science calls attention to the pertinent fact of experience

that there may be cases when it is absolutely uncertain whether a given person is still living or has died; or there are cases in which it is certain that a person was alive at a certain time and was dead at a later time, but it is uncertain when he died. Here come in also as matters of detail the questions of untraceability, as well as, on the other hand, the "*ius commorientium*."

The causal connection that is required by Roman law between an injury that is to be made good and the fact responsible for it, has given rise, as in the "*actio legis Aquiliae*," to a schema that has been worked out in various ways; in particular for those cases in which a second injurious fact crosses the first.

The proposition, "*commodum eius esse debet, cuius periculum est*" has called forth a richly articulated schematism of the empirical material. In acquisition of ownership through "*accessio*", are worked out with precision the possibilities in which experience may be in accord with the general idea of this law. The possession of negative servitudes and the acquisition thereof by prescription offered a detailed theory in the same way.

"*Ususfructus nominum*," "*pignus nominis*" and "*subpignus*" are doctrines which have been built up on the basis of particular propositions of Roman law according to schematic distinctions merely. The responsibility involved in dotal property that is subject to restoration can be exemplified only in typical combinations of particular hypothetical cases. And the exposition of the doctrine of "*praelegati*,"* especially where there are joint legatees besides, requires distinctions in which the possibilities of their application are exemplified according to an empirical schematism.

This working out of positive law according to empirical types will no doubt become more and more important as time goes on. Hitherto our civil legal science was too

* [Heirs who have received part of the entire estate in advance.]

much occupied with the task of establishing by means of legal learning what it is that shall have the validity of an abstract norm. The questions of subsumption and of a theoretical analysis of the problems of legal judgment receded in the background. Now the rigid material of the modern code has taken the place of the flexible mass of pandects and the German private law; and that too in almost all the spheres of legal life. The technically formed major propositions also, and the rules and the institutions connected with them are furnished to the lawyer ready made. And it is only in matters of particular detail that he may dispute concerning the meaning of the laws. The ground of the problem of his vocation is shifted. There will be occasion more and more for a study of the methods of technical legal science, for which scarcely the first beginnings have been made; and particularly for a schematic working up of the legal material in order to its application.

But all types of definite positive law can never give anything more than *technical* unity. They gather together a certain material of experience and are concerned about the possibility of bringing unity into a mass of accidental opinions. And the purpose for which they bring them together is simply in order to bring them under the conditional and particular unity of positive determinations of a historical law.

The object of our study here is something quite different. The *type of just law* must be again *universal*. It must enable us to comprehend the empirical material in such a way as to abstract entirely from the specific aspects of this material. This is possible only if it springs in its formula and function from the idea of just law itself; and yet in a different sense from that of the principles, and with a distinct capacity of being realized in practice. Only then will it be possible to form the desired bond of union between the social ideal and its principles on the one hand,

and the manifold legally ordered life of man on the other.

§ 2. *The special community.* — The model of just law is the idea of a *special community* among those who must be controlled and determined according to the principles of just law. The material of doubt and dispute is furnished by the movements of social life. But our problem in all cases deals with the right conduct of definite persons whose distinct volitions stand opposed to each other. These persons who are now disputing and doubting must first be brought *mentally* into a community into which each one has to bring in his disputed volition so that they may then be objectively adjusted. Without such mental unification, without embracing the disputing parties in a framework that will comprehend them all, it would be altogether impossible to adjust their differences in appropriate manner.

The idea of a special community as an indispensable model for the carrying out of just law, follows immediately from the highest law of the social ideal. This, as the idea of just law in general, conceives, as we know, a community of free men. To apply it in a given case we must have a concrete likeness of this conception in the form of a special community of men fighting for their personal interests, to serve as a basis for the realization of the principles of just law.

On the other hand our formula is capable of embracing every conceivable question of external conduct. For the concept of a special community is not a subdivision within the legal material growing up in experience; it is not quantitatively differentiated from existing legal conditions, and signifies neither much nor little in comparison with them. We must not at all think of it as an institution based upon a definite legal system, but as a theoretical means to aid us in subordinating a concrete material to the abstract principles of just law.

Accordingly the statement is correct that, "*Societas ius quodammodo fraternitatis in se habet*" (D. XVII 2, 63 pr.). But in saying this we are already applying the principles of just law in a concrete social union; and this can not be done without the aid of the methodical concept of a special community, which helps us to decide among the disputed claims and purposes of two parties.

In the history of law we often find the appearance of special communities which have been introduced by positive law, or at least demanded and striven after, in a real endeavor to realize just law. It has sometimes been carried out for those living close to the river or the sea who are threatened by the same danger. We see it realized in the "*lex Rhodia de iactu.*" And the development of modern insurance necessarily tends to the formation of a community of the several insurers of the same person. But all such institutions of positive law stand on a different plane from that of the concept of a special community which we have introduced as the model of just law.

I might also call attention to the "*actio finium regundorum*" of the Roman Law, according to which the area in dispute, within which the obliterated boundary is found, was treated as belonging to both parties in common and was divided "*ex bona fide.*" But this is only a pale shadow of our scheme of just law and is of no importance in our study, for it presupposes the division according to the norms of just law. And further, admitting that in joint possession, where the rights of the part owner must be respected, and in partnership, where the partner always has a share, we have analogies within the concrete legal material — nevertheless we must be the more careful to remember (if we may be allowed a repetition) that our *special community*, as the model of just law, is only a theoretical means and an abstract method.

On the other hand this conception is just as universal as

the legal concept of community generally, which sporadically goes through the whole sphere of the law and finds its place and application in widely different parts thereof. For, as Eugene Huber very properly says, "In a community there is a relation in which the individual unites his interests with those of others, so that henceforth he is concerned not only for himself but has the same care also for others. The opposition of egoism and altruism does not express the idea adequately, in particular so far as its legal aspect is concerned. For in the community there is not merely the care for others alone, but the care for something higher, which embraces one's own person as well."

Since therefore our idea of a *special community* abstracts from all specific content of a definite legal system, our conception of a unitary process of subsuming a concrete volition under just law is capable of comprehending in itself absolutely the whole problem with which we are here concerned. It is immaterial whether the disputing parties are two, or several, or a great many; whether the individual is brought into relation with another individual or with the whole; or whether perhaps whole communities are in conflict. And it makes no difference what the purpose of the adjustment is; whether it is desired to carry out the existing law or to change it and put a better in its place.

This suggests the crucial point of our methodical procedure by which we can attain and prove just law from time to time. *The parties disputing must be mentally formed into a special community; and in defining and adjusting it we must make use of the principles of just law.*

§ 3. *Who is my neighbor?* — Model and principles of just law meet in the concept *neighbor*. The latter consider the question from the standpoint of the legal norms. The person subject to them must be respected as an end in himself, and treated as a participant in the community. He must not be regarded as a means, or excluded from the

community as an isolated individual. And the manner of his obligation to others must be such that even when in a given case he is excluded, he may still remain his own neighbor. To be sure this matter must not be decided in accordance with his subjective desires, but according to the aim of free volition and right choice. Thus it may happen that he is required to offer a sacrifice, even a sacrifice of himself, provided it is done to realize the idea of the community and of the common fight. What the principles of just law forbid is for the one party to treat the other according to his own arbitrary desires. But for this very reason it follows on the other hand that every member of the community must be loyal to the rest, and not merely renounce his personal desires and thus in reality treat his confederates arbitrarily. Thus every man must be able to remain his own neighbor, *i.e.* an end in himself, for the sake of making just volition possible.

The model of just law supplements this by taking up the problem from the side of practical conduct. There we were trying methodically to limit an external norm whose content was said to be just. Here our problem is to carry it out in actual practice among the members of the community. For this purpose it is necessary to make use of the formula of the model described above. And so the question arises, With whom must I in the given case mentally put myself into a special community of a right character? In other words, Who is my neighbor?

We know the answer which was given to the lawyer who wanted to tempt the Master, and, in order to justify himself, raised a doubt whether the question just indicated is capable of a sure answer. The answer is there given in the form of a parable. And the conclusion of the story can best be expressed in our own terms as follows: Who among the three persons that came along had the truest conception of the command to love one's neighbor as shown in his conduct toward the man who fell among thieves? And

there is no doubt at all that the answer is, He who gave help to the man in need, *since he was in the best position to do so*. Let us consider this matter a little further.

It has been thought that by extending indefinitely the scope of the command to love one's neighbor so as to include all men, the duty itself decreases in degree to a minimum. The share of it that falls to each one, if one may so express himself, is then precious little. Another opinion is that the formula, "Love thy neighbor as thyself," is impossible in practice because one has by nature a higher degree of inclination toward oneself than toward another.

Kant has already refuted these objections sufficiently. It is absolutely necessary to make use of the feeling of good will toward oneself as throwing light upon the norm in question; for the very reason that interest in the welfare of another merely as a human being tells us nothing positive. Without that reference to the concrete attitude of self-love, there would be nothing tangible in the formula to indicate any positive tendency of thought, except the negation of indifference. But above all we must not fail to remember that the celebrated formula of the Old Testament as well as that of the New has in view what in technical philosophical language is known as an *idea* ("Idee" = idea, ideal), *i.e.* a principle that serves as a criterion for the content of volition and its application in practice, though it can never find its own complete realization in the conditioned experience of human existence. To realize completely the love of one's fellowman as oneself would presuppose a perfect rational being that was at the same time social without any limitation. But since in both respects the life of man is subject to limiting conditions, the command in question as an ideal can only serve as a maxim, to the fulfilment of which every one must earnestly strive to approach; but to attain it absolutely is impossible if only because of the limitation of man's

physical power. And secondly in carrying out our fundamental norm we must not fail to take account of the conditioning *social* bases upon which it must be realized.

He who would take it otherwise would convert the meaning of the command, so far as its special application is concerned, into its opposite. For it is not intended merely as an ethical doctrine, but as a principle of practical benevolence and beneficence, demanding that we regard the welfare of our neighbor as our own end. Looked at in this way, it is an expression, not yet defined, for the principles of just law; and can not therefore find its realization in any other way except in social life as given in history.

This will enable us to make clear in every case who is our "neighbor" in social life and activity; and will help us to set up and make use of the model of just law. In the system of social co-operation every one is necessarily placed in his circle, and he may, not improperly, regard himself at first as the center. And in carrying out his social activities he comes inevitably in contact with different people, in closer contact with one than with another, spatially, temporally, and qualitatively. Accordingly if we attempted to disregard these actual differences by levelling them down to the same plane, we should really be introducing an inequality. The proposition we have just been considering would be changed to read, Love your neighbor more than yourself. And this would be absurd; just as absurd as to say, Love him who is far away as him who is near by; which, *for purposes of practice*, would be the same as, Do less for this man than for that stranger. "For I can *will* alike toward all," says Kant, "but in action the degree of service may differ considerably according to the degree of affection (for one man is nearer to me than another) without detriment to the universality of the maxim."

If we combine these ideas with our own doctrine of just law, we arrive at the method of arranging the persons living under the law *in concentric circles*, for the purpose of properly establishing the special communities of which we have spoken. Every one belongs to the same smaller circle with certain other persons who have been long united with him legally, his relatives (used first in an indefinite sense; cf. BGB. 2270, 2 a. E.; 530, 1; also 1969). And around him as a center are formed other circles with constantly increasing radius. And every time he associates himself with other men he draws the persons on the concentric circumferences according to the order of their circles into that conceptual special community. Historical law establishes these concentric circles. But the material is here widely scattered; and we must leave it to further investigation in legal science to unify in manageable fashion the positive legal systems in their specific historical character. Here it will suffice to contribute some data by way of suggestion.

The first support has generally been found in the regulations governing hereditary succession. Here the general rule is that those circles are indicated in the form of a definite order of rank among those persons who are supposed to have a certain claim on the property of the deceased. This is made still more precise by the peculiarities of the rights of compulsory portion, of hotchpot, and so on. And it is given specific expression in the right of the nearest preferred heir. The order of precedence in the duty of maintenance, which frequently corresponds to the statutory order of succession, also belongs here (BGB. 1606; 1608; 1609; cf. also 1389). And we may also remind the reader that the possibility of recalling a gift when the donor subsequently becomes poor or has children born to him has been discussed and decided in the affirmative (cf. C. VIII 55 (56), 8; BGB. 528 ff.). Think also of the permissibility of declining a guardianship

for oneself or children on good grounds (BGB. 1786); or of the right to look out for relatives in cases of necessity or danger (StGB. 52; 54).

Roman lawyers have always emphasized the justice of such concentric circles (cf. D. XXXVII 11, 2 pr.); and considered at the same time that it might be fair to assign in advance the place of a "nasciturus" in one of these circles (D. XXXVII 9, 1, 11). And that they did not in these cases simply appeal in a formal way to the principle of "aequitas" is clear from the fact that in an appropriate case they also drew the conclusion that those belonging to the smaller circles were to be considered first in the obligations of the center. Thus earlier Roman law did not know the "exceptio excussionis personalis" in the law of pledge; but since the time of Severus it has been introduced casuistically into the administration of justice and placed under "aequitas" (XLIX 14, 47).

No legal system can be free from the maintenance of such differences in rank as we have just discussed. No matter how hard it may try to conceive of the individual subjects in purely abstract fashion and at the most recognize the citizens by numbers and geographical divisions, nevertheless it can never get along without noting certain personal relations, narrower labor communities, and permanent special unions.

On the other hand for the purpose of setting up the model in a given case, the positively drawn circles must not be regarded as iron-clad and unchangeable. They may have to be broken through, as in the case of an outsider who can not maintain his natural or rational existence without the right assistance of the one in the center. In that case he becomes the *neighbor* of the person in the center. These two then form in thought a special union between themselves; and in the adjustment of their relations, those of the concentric circles who ordinarily have the preference, must now recede into the background

even if they have to suffer disadvantage in doing so. These are the considerations that must guide us in every case in building up the *special community*. Within this community we can classify typically the services which the members may do for each other to realize the principles of just law.

§ 4. *Types of performance.* — The idea of a *special community* extends itself in two directions and thus fits naturally on to the principles of just law. For it implies that every member has good reason for claiming from the other *respect* as well as the right of *participation*, and thus the principles are brought into realization without further ado. But we must remark in this connection that there are two ways to be observed in the maintenance of the principles:

1. *In the legal relations of several persons among themselves*, who are united by the positive law, for example the parties to a civil contract, the members in a “*communio incidens*,” the persons united by the law relating to family or State.

2. *In the relations to third parties*, for the treatment of whom several individuals have united themselves. Here too the latter must not offend against the principles of respect and participation.

This twofold application holds true universally. For it follows from the fact that in applying the model of just law in practice we are not dealing with positive association, but with a method of defining certain legal relations justly. Each of these two divisions lends itself to the same kind of schematic consideration of the legal doings and forbearings involved therein. All such adjustment culminates in the decision that the one and the other must conduct themselves in a certain way. It follows then that the person so addressed must inaugurate something. He is required to do or not to do a certain thing by a compulsory command imposed upon him from without by a regulation

of law. Such ordered conduct (which may be designated in the widest sense by the term "performance") may affect a person in two ways. He must either be ready *with his person*, and place it at the disposal of the law's command; or it may be a question of *changing the traditional legal material*, so that existing legal relations shall henceforth be considered differently from before. If we regard the legal relations which center in a given person as his *property*, we can divide the general types of legal conduct into personal performances and those accomplished by means of the legal relations of property. And there is a third division, due to the fact that according to the fiat of the law there are certain ready-made relations, the peculiar characteristic of which is reciprocal personal devotion. They are found in public as well as in civil law; and form in the latter the relations of family law. These are the permanent relations exhibited in family life, such as undivided community of life, protective authority, filial subordination, and guiding care. So far as these relations exist, they may give rise to a new mode of conduct; and we may have, emphatically speaking, a performance *with persons legally entrusted*.

Now although this last type of performance runs parallel with that named above in the second place, namely with the performance due to change in the fixed legal material, still if we consider the model of just law as working out the principles, we should rather class the last type as belonging together with the first, namely personal performance. For in these two the problem turns only about two questions: First, *whether* there should be any such legal obligation *at all*, namely to perform an act with one's own person or with the person of one legally entrusted; and secondly, *in what manner* such a definite obligation is to be realized. Whereas in all performances with property there may be a third question besides, namely, How can we justly decide the quantity

and amount of a performance one is obliged to carry out?

It is easy to see that this opens the way to a discussion of the *objective value* of a legal performance. The double meaning of the word "value," as *use value* and *exchange value*, which has generally been observed since the days of Adam Smith, is exhibited also in political legislation. Thus ALR. I 2, 111, says, "The value of an object is determined by the use its possessor can make of it." This has reference to *use value*. On the other hand the Saxon Code, 78, is of the opinion that, "The ordinary value of an object means the money value it has in ordinary business intercourse." Here we have the idea of *exchange value*, though too hastily combined with that of price in money. This is of course unessential; whether we apply the word *price* to every actualized exchange value or only to that exhibited in money. In our discussion we are interested only in exchange value and not in use value. For the former alone has the exclusively *social* signification; whereas use value is only a technological concept which is essentially independent of the condition of social order.

Exchange value may mean two things. It may denote that exchange value which has actually been established under empirical conditions; that quantum of measure according to which performances have been and are exchanged "de facto." Or it may denote that exchange value which, under similar circumstances, would be *objectively just*, that relation of measure which would be in vogue if business were carried on according to *principles of justice*.

It will always remain the merit of Karl Marx to have shown the necessity of giving an objective meaning to the idea of exchange value; though there is good ground for the opinion that it was only a suggestion and he did not succeed in finally solving the problem which he raised.

As is well known, he defines the true value of a "commodity" (in which he included also the labor power of man) to be the "socially necessary time spent in labor." It is the only thing that is common to all commodities, and hence is capable of being an abstract measure of value. "From the point of view of value, all commodities are simply definite masses of congealed labor time."

This led to an energetic attempt to find an absolutely fixed value for every performance in legal intercourse. To be sure, it was not made clear what the significance of a value thus determined would be; whether it was to be *causal*, and make its way through with elemental force; or whether it should be *telic*, and serve as a just standard for the evaluation of a given performance. But as a matter of fact "value," as an independent guide in the sense of an independent principle, has no basis to stand on. It is possible indeed, nay it is necessary, to demand that a performance shall be known in its *true value*. But then the "value" is not a sovereign magnitude speaking with absolute authority to produce an effect or with a view to a purpose; but it is the result of an objective evaluation derived from and dependent upon the principle of *just co-operation*. This follows from the exposition of Marx himself. For when he lays down the "socially necessary" labor time as a standard, we must ask further, How are we to determine whether a certain social working in common is *necessary* or not? It can not be that he means the time required technologically, without regard to who of the members of society is doing the work or how it is to be done. The tacit assumption rather is that we must consider such doing of work as is indispensable when *justice* is observed in its arrangement and common accomplishment. "Socially" necessary means necessary in a "*justly*" *ordered society*. Accordingly it follows that the value of a performance is in every case the result of its evaluation according to the principles of *just law*.

It follows therefore that in estimating the right value of a performance the material must in every case be taken from specific social phenomena. These already have a conditional value in business intercourse, the actual exchange value. Without this historically given basis, the search for a *right* determination of value has no meaning. But the material may without doubt furnish us with a right evaluation of a *particular performance* according to the principles of just law. That estimate which in a concrete case seems right and in accordance with those principles, that is the *value* of the performance in question.

The applications of this method as required by our law must be verified by the *Practice of Just Law*. As we said before (before we began the discussion of the concept of value), the present question is concerned as a whole with the *amount* of a given performance. Here two things are in general possible.

(a) If the performance required of a person increases unduly in amount, this circumstance may make the requirement unjustified entirely or in certain directions. Here we see with special clearness that an objective result can be attained only by observing the common exchange value as it actually is. Only in this way can we tell whether *under these specific circumstances* a performance required by law is still in agreement with the principles of *just law* or not.

(b) The matter itself is not changed when the question concerns not the *existence* of the legal obligation but its *magnitude and extent*. But in this respect our actual law (or any other law that is of interest to us) has not yet made an attempt to set up the idea of an *objective* value of a performance as something that must be stringently observed. As long as the *fact* of the obligation is not doubtful, our positive law often leaves wide room for party preference in the matter of amount; and the grounds for determination are not always just. Legislation

has chosen in this case to leave the way free to the particular parties concerned, in the hope that an appropriate result will work itself out as a general rule, and resigned itself to the possibility of merely striking an average. This is corrected in the general regulation that the performance of a debtor's obligation, where circumstances have changed, must be adjusted "bona fide" with respect to the amount of the performance also; and in particular situations the rule is that the magnitude of the performance must be determined "fairly." We are now ready to proceed to the discussion and decision of particular legal questions.

§ 5. *Descent to particular questions.* — When in modern legal philosophy the question is raised of realizing the demands of justice in actual practice, it is always done in relation to politics, in particular with reference to the making of new law. But very little is said as a rule about the mode of utilizing the idea of just law in the problems of administration of justice. This usage has not proved of advantage to the matter under discussion.

Politics in the general sense means the management of the affairs of a legal group in the interest of this group. Its means are twofold; consisting either in changing the existing law and putting a new law in its place, or in carrying out and utilizing the existing social order in the interest of the union. The latter is completely parallel in *form* to the management of a private business by a private person.

That the important thing in political activity as just defined is to act justly, is quite plain at first sight. The simplest observation teaches that every statesman ultimately accounts for and justifies his acts by maintaining that they represented objective justice in the given case. And then he can not get away from the necessity of reflecting at times upon the general aim and method by which particular legal measures may be justified. And so it has been the reflection upon the aims of just politics that has till

now done most to impel statesmen to consider the universal standard by which just political enactments are to be measured.

Now as a matter of fact all legal activities without exception must follow the same principle and the same fundamental method. And it follows necessarily that the principles of just law must be observed everywhere without essential change. And yet a certain considerable modification is possible in their utilization. For in the administration of justice the judge has to adjust a given case in dispute which, as a specific question, is exhaustively presented to him in the two opposing claims of the parties; whereas in the administration of the State, internal as well as external, one has simply to proceed uniformly in accordance with principle. On the other hand in the political problem which aims at making new law, we are dealing with maxims which, while applying indeed to specific cases as well, are nevertheless creative rather than merely adjustive. Therefore the principles of just law in the political problem last mentioned may assume the form of instructions, requiring the person having the power of representation to take the initiative. I would call the principles of just law in this last application, *Political Postulates*; and will briefly enumerate these demands.

1. *Postulate of the security of the law.* The law in force must be protected against arbitrary violation. It can be set aside only by new law.

2. *Postulate of personality.* The obligations of persons under the law must be determined in such a way as not to lose sight of the idea of a common struggle. Every one must at the same time remain an end in himself.

3. *Postulate of universal provision.* We must see to it that as many as possible are educated with the best thoroughness attainable to will justly. Here the duty of providing for maintenance and support is not specifically emphasized. For a proper share in the productions of the

social economy is a self-evident presupposition for education in right willing; which latter is incompatible with mere restriction to the particular provision for existence.

4. *Postulate of measure.* The power of disposition granted the individual by law has its limits above as well as below. This must not be included in the amount of one's property. Rousseau says, "L'état social n'est avantageux aux hommes qu'autant qu'ils ont tous quelque chose et qu'aucun d'eux n'a rien de trop." And the same idea is naively though strongly expressed in a Hessian folk ballad,

Happy is the middle state,
Pleases me in great degree,
That in the course of human life
My neighbor I can love.

In truth, however, our postulate is applicable to all legal questions, and finds its place in public and family law as well as in the rules governing the disposition of things and rights.

In political questions these postulates must again be applied in the manner suggested in this section. The statesman must form the interests, desires, and efforts in each case mentally into a community, and then adjust them according to the principles of just law, in the form of the instructions contained in the postulates. Here we can see that the political question, which is the first to present itself in one's search for just law, is not the best suited for the precise realization thereof. For the material with which we are here dealing is extremely complicated and remarkably comprehensive. This alone makes the derivation of a model of just law extremely difficult; and the difficulty is not diminished by the introduction of the political postulates. And then there is the additional consideration that the subjective interests are here brought more prominently into the foreground and resist the attempt to objectify them in a greater degree than is the

case in the normal fulfilment of the judicial function. And finally we must observe that there we are dealing with the proposal of new measures to effect certain ends, and hence there arises the new problem how to exert the best and safest influence upon the subjects; whereas in the administration of justice this, too, is entirely lacking.

In the latter, too, it sometimes happens, indeed, by way of exception that the judge has to take into consideration large social phenomena, which ordinarily interest the statesman only. Take the case, for example, of a contractor who can not fulfil his contract on account of a strike of his employees; where the question arises whether perhaps the demands of the workmen were justified, and the employer was to blame for allowing the strike. But on the whole such cases are rare, and the difficult problem of psychological influence is entirely absent in the function of the civil judge, whose business it is to decide the case in an objective manner.

It follows from this that in order to exhibit practically the method of *just law*, it is best for the present to turn our attention to the problems of the administration of justice. Here a proper adjustment of the differences arising between definitely opposed parties is very well calculated to make generally clear the working of our method. If this is accomplished we can hope for corresponding progress in questions of politics. And we shall for the present exclude from the administration of justice itself the sphere of criminal justice. It might seem as if the latter would be simpler than the civil administration of justice, because the defendant seems to be the only one who is in question, whereas in civil disputes (and similarly in lawsuits pertaining to public law) there are two parties opposed to each other. But this appearance is deceptive.

The essence of punishment in my opinion is correction of (not retribution for) the violation of law that took place

(cf. above p. 107). To go about this correction in a methodical way, the delinquent must be conceived as belonging to a special community together with all those who are subject to the law; and in adjusting this relation according to the principles of just law, the crime committed by him must be laid at his door. This gives rise to special problems which must be thoroughly considered and solved separately; and this additional work may easily exceed the power of any one man. And besides, as we have here on one side the whole community with its complicated character, it follows that criminal justice is not so well fitted as a first introduction to the practice of *just law*, as the treatment of cases from the civil law.

Passing over to the latter, we must distinguish two methods of treating problems of civil law, a *formal* and a *real*.

1. The formal method teaches the methodical analysis of a given legal fact, and endeavors to find a sure method of subsumption by means of a proper arrangement. It exhibits the following scheme.

(a) Exposition. (α) Persons. (β) Legal relation. (γ) Claim. (δ) Object of claim.

(b) Deduction. (α) Ground of claim as derived from the theory of juristic facts. (β) Defence of the defendant, by denying the charge or by a legal counter-deduction and defence (as conclusive defences and as pleas). (γ) Reply of the plaintiff. (δ) Closing of the pleadings by the defendant.

2. The real method aims at obtaining the right result in a given case. This may be twofold.

(a) It may aim to derive practical models from technical legal science. This was discussed in the first paragraph of this section.

(b) The aim may be correct judgments in disputed questions according to *just law*. This will be considered in the third Part. We shall make use of the classical legal

science of the Romans and the suggestions of our civil law. We shall consider the practical bearing of those cases which the Civil Code claims to have decided according to the norms of just law; and we shall show by a sufficient number of examples how the theoretical method can be changed into the practice of just law.

The increasing practice of modern legislation to judge directly according to just law (see above p. 29 ff.) has been objected to on the ground that the certainty of administration of justice suffers thereby. But we can not dispense with this reference to just law as a means of good legislation (p. 197 ff.); and it has not been proven that it is out of place in the manner in which it is applied in our conditions. It may be admitted that owing to the greater prominence that is given to direct judging in accordance with the requirements of justice, the theory and application of law are given new and difficult problems. But these problems can be solved; and there is no necessary uncertainty or vacillation in the matter itself. So far as there are still doubts remaining in carrying out the method of just law, this is due to the problem of subsumption generally. For the subordination of a particular case to a general proposition can never be carried out with absolute precision. For there is no mathematical basis on the one hand, and on the other there are other things at stake than the mere logical arrangement of concepts. Accordingly the activity of our judgment in subsumption is dependent upon natural talent and training in practice; and hence it may sometimes leave room for remarkable variations in conception.

But it would be an error to suppose that the uncertainty in problems of legal subsumption can be removed or even mitigated by confining ourselves as far as possible to technical regulations of positive law. Quite the contrary, we may expect less doubt and vacillation in the administration of justice when one is resolved to carry out the method of

just law, than if one is engaged in subsuming practical questions under iron-clad paragraphs of the law. In our criminal law we have on the one hand strict tight-lacing of the judge on the question of the criminality of an act and on the other hand wide latitude on the question of the degree of punishment. But the feature that is at present felt to be most vexatious is the restriction of the first by technical rules. The latest discussions whether electricity is a "thing" showed again how little exclusive formalism can secure legal certainty. The same thing can be shown by the merest glance at the application of the technical rules of the new civil law. Consider, for example, economical business management; temporary disturbance of mental activity; change in the nature of the constituent parts; economic purpose of the principal thing; fitness for ordinary use; inappreciable decrease in value; ordinary deterioration through use; obtaining actual power over a thing; inappreciable injury in the use of a thing; replacing of a new thing, where the value of manufacturing is not appreciably less than the value of the material; and so forth indefinitely.

We see therefore that the occasional hesitation in practical legal science is not to be ascribed to the practice of referring directly to just law; but it is due in the first place to the act of subsumption as such, which always leaves one apprehensive; and in the second place to the very necessity of working with the material of positive law, the exposition and application of which is always exposed to doubts. But we may now take up without fear the practice of just law according to the method of just law above indicated.

It is not uninteresting to see how in former times also there emerged doubts and scruples touching the danger of insecurity in the law that would arise if, as some desired, one should go back to the content of *just law*. And it is interesting to see also that these doubts were rejected

absolutely by the use of a forcible little word. The word was justified and well-chosen, but the problem remained for the coming generations to solve.

“In the year 1546 D. Martin Luther said in Eisleben that Aristotle never wrote a better book than book V of his Ethics, and laid down a beautiful definition, ‘quod iustitia sit virtus consistens in mediocritate, prout sapiens eam determinat.’ Then he threw in ἐπιείκεια. . . . Now the lawyers insist, ‘quod iustitia sit virtus tantum in mediocritate.’ They will not admit ‘prout sapiens determinat’ . . . Then D. Jonas said, ‘Doctor, they are throwing this in our teeth now; they tell us that since the laymen have the power to express judgment on Christian doctrine, they want to adjust and manage worldly affairs in the same way . . . every one wants to be the ‘vir sapiens.’ Then the doctor answered, ‘Then we must see ut habeant virum vere prudentem; ἐπιείκεια must remain.’ ”

PART THREE

PRACTICE OF JUST LAW

“Action is easy, thinking is hard; action in accordance with thought is inconvenient.”

GOETHE.

FOREWORD

There are two methods of legal subsumption. A particular case may either be brought under a technically formed statute, or it may be judged directly in accordance with just law. The following exposition aims to present the model and examples for the second method.

The reader who desires to follow our investigation is requested always to keep in mind what has gone before. In particular, the fundamental idea of just law, embracing social ideal, principles and model, is always presupposed here as known. But, yet, this is not to say that in the particular discussions which follow, the general theories of the earlier books should stand as a common factor, so to speak, in front of the parenthesis. The former investigations are distinct from those which follow, and the latter must be regarded by themselves. For the practice of just law is related to its method as the art of surveying to geometry. Like surveying, the practice of just law is not universal in its validity and not always absolutely demonstrable. It has to do with particulars in constant change and disorder; and its function is to bring these changing particulars under general laws by means of the legal power of judging. Accordingly it is dependent, on the one hand, upon the unstable material and, on the other, upon the unavoidable difficulties incident to the process of subsumption.

Accordingly the right activity of the legal practitioner is *an art based upon scientific insight*. The former without the latter is action without order, without firmness and without clear and conscious direction. And science without the ability to carry it out in the practice of an art leaves a gap between science and life. We know indeed that there is no touchstone of practical life which can take

the place of an absolute standard. But there is no doubt that the value of an act depends upon the extent to which it verifies the scientific criterion and carries out the objective method. And we must conceive of the education of the lawyer in this sense as preparing him for his work in the manner described by Goethe in his novel. "Nothing was left undone to furnish him with all the knowledge, and to develop in him all the activities, which the State may at any time require: the practice of strict judicial law as well as of the milder kind, requiring wisdom and skill in the practitioner; ordinary calculation for everyday use without ignoring higher aims; all these things, however, in immediate relation to life in their certain and inevitable use."

Applying this to the practice of just law, we can distinguish here also exercises for the beginner and practical subsumption in more complicated cases. The former are intended as exercises in learning *particular principles*. The problem of the second is safely to master such practical questions as are found in combination in any given situation and give rise to doubt and difficulty, so that we may be able to find at once where a case in question belongs. We shall try in the sequel to give an exposition of the first, and arrange the problems in five systematic sections. In the first section I will use the principles of *execution*, in the last I will apply the principles of *existence*, while the intermediate sections will contain all the principles of just law. If this first step is successful and the individual lawyer has a firm hold on it, the solution of the more complicated problems in practice will have no further difficulties for him.

We must always remember that the judge has a right to introduce and exercise "just law" directly, only in those cases where the positive law directs him to do so. As an officer his duty is in all cases to carry out the positive law and no more. This restricts him sometimes to the tech-

nical regulations and the limited consequences derivable from them. But in other cases it sends him to the fundamental purpose of all law, to the idea of just law, and bids him derive therefrom, of his own accord and without intermediate help, the result which is objectively just. The positive law may lay this duty upon him by explicit instruction or by silence. And it may very well happen that a doubt and dispute arises whether in a given question the real intention of a certain statute is that the judge shall render his decision in accordance with the fundamental idea of law directly, or simply in accordance with the positive and limited rule. In that case it is a question of the proper interpretation of a given law. But in all cases the thing that is officially carried out in practice is the positive law as represented in its concept. And it is only the derivation and proof of the specific *content* of this positive law that may be done in two distinct ways; of which the one that draws directly from the social ideal in accordance with the principles and model of just law is that which interests us here.

As said before, we shall take as our material the expressions of the classical Roman lawyers, as well as the instructions in our modern civil laws concerning the administration of justice according to just law. We shall indicate the sources of the former but not of the post-classical and modern. For in Roman law we actually find model *decisions*, though the explanations and proofs are not of the same importance (cf. above p. 125 ff.). As far as the later cases are concerned, they were also aware of the danger of rigid regulation in advance, and to avoid this they always had to reconsider the *method* of just law, and to explain and verify it anew. And it is clear without the need of stating it that in the discussions on the important norms of our own Code stress is laid upon the influence exerted by just law. Our studies on this matter endeavor to be complete and exhaustive, qualitatively

speaking; but are not intended to furnish a commentary on those technical regulations which were from time to time associated with just law.

But no matter how much we may concentrate on this problem or how thoroughly we may enter into the practice of the method of just law, one must not expect to find in what follows a few ready-made pigeonholes in which doubtful cases may be placed. It must be plain to every one that practical exercise requires independent intellectual work. All that can be accomplished here is to carry forward the theoretical discussion up to the point where the particular questions begin to divide. The lawyer must test it critically for himself. We invite the reader to enter into the spirit of the doctrine here presented, to penetrate into the ideas of the principles and the model of "just law," and then ask himself whether those ideas are properly applied by us.

The *concept* and *method* of just law must be certain and rigid, but the *practice* thereof may be capable of improvement. What is presented here is a first attempt. And the saying of Horace is in place here:

"Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum."

CHAPTER ONE

THE RIGHT EXERCISE OF LEGAL RELATIONS

§ 1. Exercise of rights of exclusion. § 2. Performance in "good faith." § 3. Avoiding "abuse" in family rights. § 4. "Practicability." § 5. Determination in accordance with "fairness."

§ 1. *Exercise of rights of exclusion.* — In the celebrated lawsuit of the miller Arnold under Frederick the Great, the question under discussion was whether the neighbor of a miller may construct fish-ponds and fill them from the water of the mill-stream if the miller is prevented thereby from getting enough water to drive his mill. The neighbor, who was the defendant, maintained his absolute right to do this; and in his examination gave expression to the following view: "That since he was merely exercising his right, he was not concerned about the water being withdrawn from the plaintiff; that this is the dictate of good common sense; else there would arise the greatest injustice, and he would be deprived of what was evidently his property and well-authenticated right."

The supreme court adopted this view and rejected the charge on the ground, "That the defendant can not be prevented from constructing the pond; and that he also has the right to use the water of the river to fill his pond. For as long as the river flows through his grounds, it belongs to him; and a person who exercises a right that is his does no injustice to another."

The king was highly wrought up about this judgment. He felt that a grievous injustice had been committed against the miller. A charge was brought against the

judges who rendered the decision. But the senate of the supreme court expressed itself as follows concerning the vexatious decision participated in by the accused: "In the absence of a (provincial) law or statute expressly providing for this case, the two branches of the court, supported by the generally recognized law of nature and some statutes of the common Roman law (to which, according to the order of the sovereign lord, recourse must be had when provincial statutes are lacking); and with the approval of the most celebrated jurists, assumed it to be a just legal principle that every proprietor or owner of real property may upon his own ground and estate build and lay out as he pleases, and that consequently he may use and apply the water of a river flowing through his estate in any way he sees fit, without concerning himself about the convenience of his neighbors, so far as he is not restrained by police laws or by contracts and agreements with his neighbors. . . . He only exercises his right; and, according to the law of nature and the statutes, the following principle is valid that a person who exercises his right does no injustice to any one."

But Frederick the Great decided otherwise. He rejected the judgment of the supreme court, removed the members of the council who were responsible for it and sent them to the fortress for a year. The mill was again put in order and Arnold's loss was reimbursed from the private property of the judges. The ponds that caused the damage were destroyed.

Now what is the correct judgment in the matter? The central question in our case is that of the *just exercise of rights*. Here the concept "exercise" itself has caused difficulty in theory as well as in practice. This may be due to the fact that the expression in question is in fact applied in legal science in two senses. In the one sense it denotes *practical activity* in contradistinction to *judging* about certain rights and duties. In this case the final result of

reflection is presupposed, and the question is merely one of action. In the second sense the term denotes a mode of conduct that is in harmony with the regulations of positive law, but which must be subjected to further proof. The law grants certain powers of disposition which one may carry out in practice. But it makes the reservation that in certain cases these powers are for good reasons limited or entirely removed. We are here dealing therefore with a specific technic of legislation — a certain mode of action is permitted until the matter is proved otherwise. This provisional approval of a process of action our legal terminology preferably denotes by the expression, “exercise” of a right; for example also BGB. 226.

In our discussion of right exercise we shall distinguish the three great classes of legal relations as they are found in civil law. We shall consider family law separately, and in the law of property we shall separate the laws of exclusion from those of association. All these concepts we shall take over from elsewhere (“Relations of Obligation,” § 2; “Manual Lexicon of Political Sciences” VI, p. 612) and presuppose them as known.

In the rights of exclusion the thing that is likely to produce doubt and dispute is the *quality and extent* of the power of disposition over an object, granted by law; and correspondingly the quality and extent of the exclusion of third persons therefrom. So far as the desire of the person excluded is concerned, we must distinguish two things. He feels either positively injured or hindered in his activity. And he accordingly desires either compensation for his loss or that the excluding party should refrain from exercising his influence upon the object belonging to him. In practice these two things are closely connected and appear actually combined in experience. But it is clear that in legal discussion a claim for damages and an action to restrain one from doing certain acts must be kept distinct. Accordingly we shall discuss the former in our

treatment of the Duties of Just Law (in connection with BGB. 826). The second belongs here.

That the exercise of exclusive rights must be kept within certain bounds, outside of which it is inadmissible and must be desisted from, is a thing which can not be denied. As the individual is and has nothing which he does not owe to the community to which he belongs, so every exclusive power of disposition that he has comes to him from it. Therefore to exercise this power without any regard to the members of the community from which as a unitary body he received his right is clearly unjust. To prevent this and produce a result that is justified, law has the two means at its disposal that were described above. The law may indicate in advance by means of technically formed statutes what in general the right mode of conduct would be; or it may lay down instructions that in case of uncertainty the matter should be decided in accordance with the fundamental idea of law.

The first means, constituting *just* law in contradistinction to *lenient*, has been made use of considerably in our statutes. The limitations of the rights of a neighbor are especially conspicuous in this connection; also the often cited proposition of BGB. 904. But in the case cited at the beginning of this section there was really no other decision possible, according to the positive law at that time, than that adopted by the supreme court; and the imperial law of the present day would dictate the same judgment. The only thing to do would be to go back to the provincial regulations concerning mills (EG. 65; besides ALR. II 15, 246; Prussian Code V. 28. 2. 43 § 16; 17).

But there would be no difficulties in arriving at an objectively just decision in every case on the basis of the *Idea of Just Law* by means of the method above indicated. We should then have to conceive of the party excluding and the party injured thereby as united in a separate com-

munity, and see how this community in the given case must be worked out and adjusted in accordance with the principles of just law. The only principles available here are those of *participation*; and of these only that of *execution* (p. 163). In carrying out this principle each of the parties must be treated in such a manner that whatever his position he may remain his own neighbor. This has reference to the possibility of exercising an exclusive right as well as to enduring the loss arising therefrom. We must therefore reckon the loss which the person entitled would suffer by refraining from the exercise of his right as well as the loss accruing to the other party from the exercise of the right by his opponent. The disadvantage arising from a passive attitude or an active exercise must not one-sidedly be set to the account of the one party only.

Thus in the dispute of the miller Arnold, he alone was the entire sufferer from the construction of the ponds. And on the other hand if the proprietor situated above him had been obliged simply to refrain from doing what he wanted, the loss would have been entirely on his side. The proper adjustment is therefore as follows: The person entitled has a right to the use of the thing belonging to him, and is not bound alone to bear the loss arising from his refraining to use it. But in the exercise of his right he must observe a certain manner and degree to the end that the disadvantage necessarily accruing thereby to the other party may not be out of all proportion to the loss which the person entitled avoids by the exercise of his right.

The *right proportion*, finally, is obtained in the following way. There is bound to be a loss in such a case every time. It is composed of the loss due to the endurance of the party excluded and the loss of refraining from the use of his object on the part of the person entitled. The loss must, in accordance with our previous discussion of the meaning of "value," at first be computed with reference

to the exchange value as actually determinable (p. 227). And this combined loss, so determined, must now be divided between them in proportion to the amount of property contributed on each side. The *general methodical* instruction ends here. And it is possible to combine with this an empirical schematization, using hypothetical cases in illustration.

As we have seen in the section on the Types of performances (p. 224), a member of a community may, so far as his legal obligations are concerned, be called upon to do service with his own person, with those who legally belong to him, and with his property. The first two (which may for our purpose be regarded as one) are not of great importance in the question concerning us at present; but may be of interest in specific cases. The white plantation owner who thrust out into the damp and the cold the Canadian seeking shelter, and exposed him to the hardships of the weather and the lack of nourishment, made an *unjust* use of his property. This may represent a typical case. And we may easily characterize exaggerated measures of protection, exclusive without regard to other people's interests, as unjustified. This is indicated in technical legislation, for example, in reference to spring-guns, fox-traps or caltrops (StGB. 367:8; cf. also BGB. 904). But even without reference to these positive facts there may be a violation of the principle of just law we are here considering if, when a third party is exposed to danger, a property owner in the neighborhood makes his rescue impossible by insufferable or dangerous measures.

The most important cases in practice are naturally those in which a person suffers loss of property as a result of exclusion, due to the unjust exercise of a right. Five cases are here possible.

(a) A right of exclusion affects the neighbor. This was the condition in the dispute mentioned above. Such differences between neighbors can never cease; and we all

remember no doubt the delightful description of Freytag in which, when the external peace of the coming golden age is realized, the last quarrel and strife is found sitting between the walls of neighboring houses. Here even the Roman lawyers did not succeed in analyzing the matter with adequate clearness (cf. D. VIII 2, 9; XXXIX 2, 24, 12; ib. 26; XXXIX 3, 21; ib. 1, 11-12; L 17, 61). To make this clear we shall have to make some distinctions. The exercise of one's property rights (for the sake of brevity we shall let it represent all other exclusive rights) may be such that it *indirectly* restricts or destroys the use and complete utilization of his estate on the part of the neighbor; or it may be a question of a nuisance which may be prevented by the "actio negatoria." Thus in recent judicial decisions the causing of improper noise has sometimes been inappropriately classed under the principle of illegitimate use of "one's own" property, whereas it should have been regarded as a case of unjustified interference with the property of "another."

This distinction of our positive law must of course not be confused with the distinction above mentioned (p. 245) between a claim for damages and injunction proceedings against the injurious act of another. Of the two cases here mentioned we are now concerned only with the question of an unjust use of "one's own" property. The opinion has indeed been expressed that even in nuisances in themselves illegitimate the question may be raised whether the injured proprietor has good ground to forbid the act in question. Cases of such doubt would be for example when a person complains of the smoke and odors of a factory built on ground which he himself sold for the purpose; or when a congregation builds a house of worship close by an industrial shop and then feels disturbed by the noises coming from there on holidays. But this is simply a case where the proprietor willingly renounced certain rights and is now inconvenienced thereby; or it

is a case where the person complaining of an injury, himself by his own deed is responsible for that injury. The question, on the other hand, in what way a person should be directed *in good faith* to refrain from an act which he is really bound not to do, will be discussed in the next section.

There are two ways, again, of limiting a person in the exercise of his property rights. Either he is required to tolerate interference (for example BGB. 904), or he is not given the power of free disposition of his property (for example the neighbor of the miller Arnold). It is not uninteresting, in respect to the last alternative, to refer to modern cases where a proprietor establishes a colony of workmen on his estate, who turn out to be a nuisance to the neighboring population.

(b) Exclusive rights in the same object. It is well known that technical law has often provided for such cases (cf. BGB. 1020; 1023; 1246; etc.). The Prussian supreme court of justice in former times went further and announced that even in cases where a servitude must in the interest of the owner of the servient tenement change its form or the status of its servient tenements, the person entitled has no right to oppose the change, "if it is an urgent necessity for the former and does the latter no injury; so that his opposition is due to self-will and not to legally admissible motives." In a number of servitudes, BGB. 1024 and 1060 recommends exercise in accordance with "fairness," as will be discussed below (§ 5).

(c) The right of a third person who suffers injury can likewise rest only upon a relation of obligation between him and the owner of the object seized. Here it is only necessary to call attention by means of legal technic to the usufruct of an object on the basis of a merely obligatory power. For the rest, the possibility of suffering loss through a neighbor exercising his exclusive right is of the same kind as in the first case mentioned above.

(d) It may happen in a remarkable way that an excluding and an obligation right meet in the same object. For example, E. lets a shop to R., a barber. It turns out that M. is joint owner of the house. M., having won this right in a lawsuit with E., gets his name entered on the register; and now declares to R. that he will not allow him to stay in the house. M. is also a barber.

(e) Finally it is possible that exclusive rights may be unjustly exercised in relation to third parties. This would be the case in an act which has no other consequence except the exclusion of a third person, and there is no possibility of supposing that the excluding power is only a means for right co-operation. Thus Fourier tells that as a business assistant in Toulon in time of famine he was compelled by his principal to sink whole wagon loads of rice and wheat in the harbor in order to keep the prices high. And in a similar way keeping things out of use, and allowing lands and mines to lie idle, may be instances of unjust exercise of property rights.

While we have thus seen that it is possible to put a certain limit to the exercise of exclusive rights, beyond which they are no longer justified, our modern civil law has made no use of it. As we have observed before, the law lays down technical norms, but does not lay down in addition the proposition that one must exercise one's rights justly. It grants various exclusive rights and allows them to be exercised in merely subjective fashion. To be sure this latter, too, is not specifically expressed; but it can not be doubted that it is the true meaning of our statutes. It stares us prominently in the face out of every paragraph containing a restriction of a real right. In relation to property it is unequivocally formulated in BGB. 903; and BGB. 905 and 997 can not be understood in a different way. And it follows, finally, in general, from the peculiar restriction which has found its way into paragraph 226 dealing with abusive use of one's property.

We must add a few more words in conclusion to make clear its meaning.

The restriction in question corresponds in thought and expression to ALR. I 8, 27 (cf. Introd. 72); as well as to a tendency in the theory of the common law which regards the proposition of BGB. 226 as the basis of the particular decisions of the Roman lawyers. And this regulation of the law has been considered till now almost without exception as an important concession to the idea of just equalization as opposed to positive limitations. As we have just seen, this is not true.

For him who regards the narrow expression, "*Qui iure suo utitur, nemini facit iniuriam*," as a fundamental principle, BGB. 226 may appear as a slight measure of freedom, at least in intention. But if we consider that the objective law necessarily and universally bears within itself the tendency to produce justice; and that therefore the exercise of powers given by law must also be kept within the objective limits of just conduct among the members united by the law, — we see that the so-called prohibition of malice is nothing more than a positive restriction in the application of right legal principles. So the Phenicians must have thought they were doing great things when, unlike other sailors, they not merely sailed along the coast, but directed their ships from one promontory to the other right across the bay. For they had neither the compass nor the instruments to find their way with safety on the open sea.

It is true that the judicial law of our time has felt the vexatious character of this limitation as contained in our code, and that many attempts have been made to resist and remove it. Thus a supreme court has expressed itself to the effect, "That we may infer malicious intent in building if the injury to the neighbor is great and the advantage to the builder slight." Other lawyers appeal to the maxim, "*Neque malitiis indulgendum est*" (D. VI 1,

38); or to the beautiful words of Pomponius, "Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiores" (D. XII 6, 14); without, however, finding the idea of the *just exercise of rights* in general, an idea which solves the problem of the legal theory we are endeavoring to establish. And most recently the Supreme Court of the Empire expressed the opinion that BGB. 226 does not stand in the way of a person carrying out his own right, provided the person entitled has an interest "whose justification can not be denied." This means that we must refer to the principles of just law.

But unfortunately, as we said before, this can not be the real meaning of paragraph 226 of our Code. This paragraph allows the unjust exercise of a right positively granted; and prohibits it only when there is no other interest visible for the person entitled except the gratification of *malice*. If there is any other interest for the person entitled, no matter how subjective, he is allowed to exercise his right, however unjust it may be to others.

That this introduces an extremely difficult question of proof in a given case, has been said often enough. And it is easy to see that the restriction still favored by the law tends to confuse the boundary line between just law and ethical doctrine. For we can easily object, in doubtful cases closely related to the question at issue, that the person entitled is acting exclusively "from motives of enmity." Then it has to do with a violation of ethical doctrine, but does not as such pertain to the question of the right conduct of one man toward the other; whereas it is the latter alone that concerns us here.

Our result then is this. Our positive law does not in general require for the exercise of exclusive rights granted to a person that the attitude and conduct to each other of the parties involved shall be just. It knows only isolated positive restrictions expressed in the form of technical enactments, including the above mentioned rule

in 226. In all other cases it allows the person entitled to exercise his rights regardless of his neighbor, and to utilize the things belonging to him in merely subjective manner.

These considerations lead us to say that the "paragraph on Malice" does not unqualifiedly apply in the sphere of civil provincial law or public law. For it denotes a positive limitation which does not extend any further than the law which formed it. The problem, therefore, remains open, for those legal questions which are not subject to the Civil Code, whether there, too, there are corresponding positive norms with technically fixed limits. But in so far as this is not the case, the universal will and desire of the law to realize an objectively just social life must be regarded as the most important and decisive consideration.

§ 2. *Performance in good faith.* — "The debtor is obliged to perform his service as good faith and regard to business custom dictate." This proposition of the Civil Code (242) has arisen, as is well known, in the course of the development and construction of former laws. Now it is the basal norm in the application of the law of obligation. We are not concerned here with the history of its former development; but we are interested in its practical application with the help of the principles of just law, which are systematically related to this matter.

The question here is, what is the proper way to fulfil an obligation whose origin and existence are presupposed? It is a beautiful idea that in legal demands also, which one person makes of the other, an effort should be made to conduct oneself justly; that what is right and proper should not be forgotten even in exacting a debt, since all legal performances are after all only means for maintaining the struggle for life in common. In this way the idea of a community of free men aids and mitigates the confusion of opposing interests. It frees those engaged in petty quarrels and oppositions from the narrowness of mere

subjective desires and purely personal dealings, which if made general would make impossible the realization of legally ordered co-operation. It liberates them from that social chaos in which shortsighted interests are thought to be the only ones holding society together. And it comprehends the disputing parties in a *special community*, in which, if we understand it clearly, the one never demands his own desire merely without regard to the other, but undertakes the performance of an act in such a way that (in accordance with the *principle of execution*) the debtor may still be his own neighbor.

The performances of a debtor may consist either in an act or in an omission (BGB. 241). According as it is the one or the other do we apply of the principles of *execution* either that of *respect* or of *participation*. Whereas in the question of exclusive rights with *real* effect, which was discussed above, the only relevant principle was that of participation, here both are in place; and in the question of fulfilling an obligation the second principle of *respect* has to be given the lion's share.

In applying the principles according to the instructions contained in the paragraph quoted from the Code, one must remember that we are always dealing in such cases with an unforeseen change in the legally significant facts. This displacement of the material either goes back to a time prior to the *juristic act* in question, in the terms of which no rule can be found for the present case (else the question would rather belong to the theory of interpretation, which we shall take up later); or in case of *statutory* obligations the change coincides with the origin of the obligation itself. In these therefore the question is at once presented of the right manner of performance.

While we are generally interested in finding an objective limitation of obligation duties, we may well deal with the fulfilment of claims springing from *real* rights. In this sense Dernburg has very well pointed out that in an action

to prevent interference with the freedom to use one's land, the claim must be made "in good faith." The same thing would hold true also for *possessory* claims. For *possession* is the "*preliminary*" right to an object. Judicial protection can be afforded for possession only by means of provisional measures before which a contradictory hearing is prescribed as obligatory. So far then as the law affords provisional protection for specific claims, there is no reason for permitting their protection in any other way except as prescribed in BGB. 242.

The person bound in a definite relation must be able to remain his own neighbor in reference to the existing obligation. The term neighbor must be understood in the manner explained above (p. 217). This would prohibit a demand which one may desire, merely because he desires it and without any regard for the will of the person under obligation, who must also be regarded as an end in himself. A demand that is as such positively established loses its inner justification when, in the manner aforesaid, it ignores the consideration of the mutual aspect. It then becomes unjust, and is in contradiction with the fundamental idea of law, though the person demanding appeals to this very idea: "*Frustra sibi fidem quis postulat ab eo, cui fidem a se praestitam servare recusat*" (VI de R. J. 75).

The *principles of execution* also designate clearly the standard by which the right result is determined. Any other does not exist in our problem. It is this standard also to which alone reference is made when in particular application here and there the duty of the debtor is said to extend to "appropriate" performances (for example, HGB. 59). On the other hand, when the Civil Code in 242 adds the words "regard to business custom," the addition is superfluous and of no use, though of equally little harm. It is self-evident that in deciding what, in a given case, is just law, we must not ignore existing business

custom. The Romans also said in a similar case (in granting "*actio empti*" to recover double the purchase money by reason of a redhibitory defect, even without a specific "*duplae stipulatio*"): "*Ea enim, quae sunt moris et consuetudinis, in bonae fidei iudiciis debent venire*" (D XXI 1, 31, 20). But the question of observing the customary practice in business pertains to the completion of the empirical material and not to the formal method of treating this material. Thus there may be a violation of the principles of just law in the failure to observe a business custom, for example, immediate complaint of a defect in merchandise, in cases that do not come under HGB. 377. But the reason why conduct of this sort in a specific case is an offence against "good faith" is not because a business custom as such has been ignored, but because of the violation of the principles, of which this is only a particular example. "Good faith" and "business custom" are not therefore standards of equal rank, but one is subordinate to the other. And there is a further practical significance in this circumstance, namely that the judgment in accordance with the first is altogether independent of the second. The judgment must be expressed even if there is no business custom in the question at issue. And when there is such, it should be incorporated into the material under discussion and the latter decided in accordance with the Idea of just law. And so the Civil Code is quite right when in other cases in which it refers to "good faith," "business custom" is left out (BGB. 162; 320; 815).

To proceed, the question has been asked how the regulation quoted from the Civil Code at the head of this paragraph is related to the force of specific understandings between private persons or to the content of other legal propositions. In case of conflict, which of them shall yield, the private understanding and the specific rule of law, or our universal norm? There are lawyers favoring either view. But the truth is that the universal proposition

of "good faith" is in performances of obligation fundamental and decisive. There can be no doubt about this as regards the matters determined upon in a *juristic act* by the will of the private parties concerned. For the proposition in question is an order to realize objectively just law, and juristic acts of the contrary character are null and void. The variety of phrase used by the laws in the expression of this idea is of no importance in comparison with the unity of the *thing*, which is contained in the concept of the *justice* of a legal content. Thus a contract stipulating that the debtor shall act in opposition to "good faith" would exceed the limits of freedom of contract, which insist on respecting "good manners." This consideration will also help us to settle an objection not infrequently heard in lawsuits, namely that the plaintiff had not objected to the conduct of the defendant, which had been going on with his knowledge for a long time, and hence the present withdrawal of his tacit approval is evidence of "deceitful conduct"; for example in a case where the lessor was expected to do something against the dictates of "good faith," or to tolerate such act on the part of the lessee. But since such acts can not be sanctioned in the first place by a private juristic act, tacit assent has no significance whatever.

But it has been said that "good faith" must be observed in relations of obligation only when the law contains no statement at all covering the matter in dispute. It is not a question, they say, of the intention or the emphasis of the law's instructions. It makes no difference whether the terms of the law are compulsory and exhaustive or only supplementary and permissive. The only thing that matters, according to this opinion, is that there actually is some kind of legal regulation. If, for example, the law says, "The lessee is obliged to return the object leased after the termination of the lease" (BGB. 556), there is no longer any room for considerations of "good faith."

It would follow from this that the obligations of the surety, which the law speaks of, must be enforced simply in accordance with the technical meaning of the law, and it is not permitted to examine in a given case how far it agrees with the requirements of "good faith." The matter would be different, on the other hand, in contracts of insurance and guaranty, in which the rights and duties are not determined by law. In an order to pay money or to deliver an object a distinction would have to be made between the cases of BGB. 783 and such as are not regulated by the law; and so on.

Now it is true that in order to harmonize BGB. 242 with specific rules a general distinction is necessary. But the basis of the distinction is not whether there is or is not a specific norm, but rather the character of the particular law as a means of legislation (cf. p. 196). The contrary view is due to a misapprehension of the concepts *positive* and *just law*. It seems to the advocates of this view that there is a distinction between positive law and a certain "ethical something" which, at any rate, is not law. This is not true. The distinction we are making lies within law itself. It refers to the difference in the *manner* in which the "content" of "positive" law is to be determined. They are merely different means with which the one positive law intends to carry out its fundamental purpose. Accordingly, "good faith" is not outside of positive law; much less is it opposed to it; but it is an instrument of the positive law, which the latter employs to determine its content.

Here I must simply refer to my former discussions of the *means of just law*, and particularly of *just* and *lenient law*. Now it may very well be, as we have seen there, that the legislature forms a certain law in technical fashion, and expresses it so strictly and exhaustively that it is not permitted in judicial practice to institute a further test whether in a given case it tends to realize an objec-

tively just result. Thus, for example, in the right of the lessee to give notice of the termination of the lease on account of the unsanitary character of the dwelling (544); and in many other cases easily found. But the presumption in our case is not in favor of such self-limitation to a supposed average. This is surely not the case in those legal propositions which appear as suggestions for interpretation or as supplementary to incompletely formed acts in the law. For if the content of an act in the law were to impose upon the debtor the obligation to act against "good faith," it would, as we saw before, be invalid. Now it would be absurd if the law should of itself interpret or supplement the content of agreements between parties in a manner which it forbids the private parties themselves to adopt.

In all other legal propositions it is in every case an open question in what class of legislative means they are to be counted. But if there is no way of determining the point, we must assume the sense of the rule in question to be that in case of a conflict, in a specific instance, with "just" law, it must yield in favor of the latter. For if law is ever to depart from its main purpose, there must be specific reasons to make us understand such exceptional procedure.

I admit that in the immediacy of practice the matter may take on a different aspect. The regiment fighting in the smoke of powder can not see the entire military situation. And yet they may help themselves in their own way to solve their special problem. But they must not think in this way to win the entire battle.

As a rule we may assume that the legislator has succeeded in getting at justice even in the permissive regulations established by him. For his rules are the result of a wide and comprehensive experience in legal matters. And while his method is not systematic, at the same time, driven by the weight of an impending general pressure in social development, he has striven to obtain objective

justice so far as legal questions of this kind admit. Accordingly it is possible to content oneself generally with these rules in regular daily practice. And it is often the more proper to do so because the *just* norm can not be carried out with any kind of precision (p. 227); and is besides subject to some uncertainty by reason of various complications, despite the convincing determination and deduction. And we must bear in mind too that the interpretation of those permissive rules of law whose meaning is not at once clear can be assisted by having regard for that which would be demanded by "good faith."

There is an example in a French case. A person was charged to superintend the work of laborers engaged in a stone quarry. To his terror he noticed a rock threatening to become loose and put the workmen to death. He ran up and called out to them to save themselves, but was severely wounded himself by the avalanche. He sued the company for damages, and the lower court said, "Qu'il y avait eu là un élan généreux digne d'éloges sans doute, mais que l'accident avait eu là sa cause véritable, et, partant, qu'il ne devait pas donner lieu à la responsabilité du mandant." The higher court, on the other hand, condemned the principal to pay damages for the injury, "dont l'exécution du mandat avait été incontestablement l'occasion." According to our law it would depend on whether the injury was caused while he was engaged in work which he was required to do (BGB. 670). *Just* law demands that damages should be granted for this reason. The agent was the only one who did his principal a kindness. His service was simply used by the latter. Now according to the second principle of respect, the former must be able to remain his own neighbor, which is impossible if he is to bear alone the entire burden of the injury. On the other hand the principal is not injured by our decision in accordance with that principle, for he was benefited by the gratuitous services of another; so that

the uncertain danger of an unforeseen accident, which occurred in the act of protecting *his* (the principal's) interests, appears merely as the equivalent of the benefit he derived from that service. We may apply here the statement of Gaius, which has since become a maxim, "*Sit iniquum damnosum cuique esse officium suum*" (D. XXIX 3, 7).

On the other hand, the meaning of BGB. 667, according to which the agent must surrender everything that he receives from the care of the business, has become doubtful. Does it mean to apply also to gifts which are made to him personally? For example if the creditor of his own accord makes him a present for his efforts in obtaining a payment; or deducts a certain amount from the bill for the personal benefit of the agent. Here again to assign everything without exception to the principal would, in most cases of this kind, not be in agreement with the maxim expressed in the principle of respect.

Our conception of BGB. 242, as seen before, is that it takes precedence in court of all permissive rules of the Code, and must yield only to the strictly exhaustive regulations. Now the objection might be made to this conception, Why not restrict all law to this rule (242)? The answer to this can be derived from our discussion of the *matter of just law*, particularly the points discussed there in connection with historical law (p. 173).

We will now pass to the practical carrying out of the particular propositions discussed so far, in accordance with the *Types of performance* outlined above (p. 224). We there distinguished performances done with one's own person, with the person of one who is legally entrusted to one, and with one's property.

1. In reference to the first kind of performance, the regulation of BGB. 242 would suggest a necessary limitation in those cases where to carry out literally a particular obligation, the debtor would have to sacrifice himself

completely and could no longer be his own neighbor. The practical importance of this principle is seen especially in connection with the termination of a lease and the vacating of a dwelling. BGB. 556 has been quoted above (p. 258). If now, as has been often observed recently, the tenant is ill, and is sure to endanger his life or health by moving at the time required, the duty of restitution above mentioned must be concretely limited. One may suppose that the same result may be reached without this deduction, simply by the rules governing impossibility of performance, but this is not true. For the object leased can very well be returned in our case on the day determined by law. There is no question here of the impossibility of performing at the expiration of the lease; — unless, indeed, we take account “in good faith” of the condition of the lessee. If we decide the question merely according to paragraphs 556 and 285, we can not arrive at the above result of an objective limitation. This can be done only by subordinating the several laws to the principles of *just law*, as is also recommended in BGB. 242.

CPO. 721 adds, “If the verdict is for vacating the house, the court may on motion of the debtor grant him a certain period of time within which to move, such as is proper in the circumstances.” The fact itself is not new. Whether we call the period of grace “proper” or “bona fide” makes no difference. What is peculiar in the proposition of the new law of procedure is purely *procedural* in character. The debtor must present his motion at the oral hearing; and the decision can only be rendered in the judgment which decrees vacation. If this did not happen, and the lessee remained living in the premises nevertheless, there is nothing in CPO. 721 preventing the objective decision of the matter as discussed above. CPO. 721 simplifies the *procedural* aspect of the case in question; but it is not meant to be the only way of dealing with the matter of vacating premises, nor does it exclude the

raising of a similar question in other cases *according to objective right*.

But our method also gives us a means for adjusting properly the transaction in question in relation to any new lessee of the as yet unvacated house; whereas this would be impossible if we merely referred to the alleged fault of the old lessee in delaying to move out. According to our method, the parties concerned must be conceived in thought as belonging to a *special community*; and the loss arising in every case must be divided in objective fashion.

Advancing a step further, we see that the important thing in this phase of our investigation is the entrance of the debtor into a *contract of work*. We must call attention to the fact that the law in its recent development, especially in the Industrial Code and then in the Civil Code, has endeavored, by means of particular and stringent prescriptions, to secure the person obligated to service against danger "to life, health and morals." But these sometimes rather rigid regulations are harmonized and completed by the general norm of BGB. 242. By their specific expression they perhaps remove a doubt here and there concerning the right manner of classifying a given case in dispute; but they must not again be conceived in a narrow and restricted fashion, or applied in isolation. They follow from the idea that the workman who is bound by a contract to perform a service must not be bound absolutely and regardlessly. And if they are objectively justified we may make inferences from them in the conduct of our legal existence even without the formulating activity of the legislator. And therefore even in such cases as are not covered by definite legal paragraphs, we must apply the general recommendation to perform one's obligations "in good faith"; and in view of this we must introduce the principles of *just execution* in the *special community* as conceived between the person

entitled and the person obligated. And the opinion is untrue (and the Supreme Court of the Empire was right in rejecting it) that outside of the things definitely prescribed by law the workman has no right to demand protective arrangements, and that "we must assume such tacit resignation on his part when a workman undertakes without objection a work which is clearly dangerous."

The consequences of these considerations often appear externally as obligations of the master and the contractor. But in reality the question is one of the extent to which the obligated workman is bound in his service. It is a question of limiting this legal obligation by taking account of the fact that he is required to stake his person. Accordingly when the limits above mentioned are overstepped, the obligated person has the right to refuse to do the dangerous work expected of him, especially in the absence of protective arrangements. And therefore the judges of the higher courts were right when they declared that it makes no difference whether the person entitled knew of the necessity or technical utility of the protective arrangements or not. Nay, they said, it is immaterial whether these arrangements were generally known and used in other similar trades or not. For the thing that is decisive in this matter is the principle of protecting *the person* of the one obligated against the danger threatening him. The question of *culpable* omission and abuse of the obligated party beyond the extent of the services demanded of him by just law does not come into consideration except in the further question of the duty to pay damages. If we hold to this decisive principle, we shall not be troubled by the question whether the employer is only obliged to introduce those protective arrangements which are calculated to secure absolute protection against danger to the life and health of the employee, or whether he must also make use of such measures as are capable of diminish-

ing these dangers in an appreciable degree. As the fundamental point of importance here is to limit the duty of obligated service, in this case the duty of the workman, it follows that the second of the above alternatives is the true one. And if there is a question whether the person obligated should not supply his own protective arrangements, as for example his own goggles in iron foundries, the way to decide it is by considering whether the danger in question is inseparable from the service to which this specific contract obligates the party. And if it is, then our limitation of the obligation is in order. Finally, it follows from the principle we are here using that when we think of a *justly* regulated co-operation, the obligation of the other party must be determined in such a way that he is to receive from the employer the necessary information and instruction in the proper manner of doing the work, in the use of the tools and the machines, and so on; so that in case of a subsequent dispute, the burden of proof is upon the contractor, which he has to sustain at the risk of being held to have bound the employee in violation of "good faith," and of having to compensate him for any injury suffered.

The question of limiting a person's obligation to do a service may have meaning outside of the possibility of immediate danger to the person obligated. Here, too, we have a number of suggestions in the laws; thus HGB. 59 (formerly art. 57). Casuistry will lose itself in a mass of scattered details. But there is no longer any doubt of the right method of mastering them. Reference may be made also to a social phenomenon peculiar to our times, namely the contracts of actors and artists. Here the question of the *right* limitation of the obligation owed by them often assumes a significant form, starting from the matter of *urgent demands* and extending to the question whether the refusal of the artist to appear before the curtain in acknowledgment of the public's applause

renders him liable to the fine provided in the contract for disobedience to the instructions of the manager.

A good analogy for all the particular questions here considered is found in the *Corpus Juris* in a discussion of Ulpian of the case where a person failed to present himself before the court as he was in duty bound: "Si quis tamen cum posset non incidere in tempestatem vel in fluminis vim, si ante profectus esset vel tempore opportuno navigasset, ipse se artaverit: numquid exceptio ei minime prosit? . . ." He then proceeds to make distinctions, which are instructive (D. II 11, 2, 8). They can be proved methodically by making use of the principle of *respect* in carrying out a legal obligation.

2. Limitation of a debtor's performance with persons legally entrusted to him. Here we must say in the first place that the same regard that is paid to the person of the debtor himself must also be shown to those persons who legally belong and are subject to him. For example in the illustration given under 1 of the tenant vacating a house, regard must be had to the members of his family or children entrusted to his education. Nay, as actually happened, the presence in the house of a dead body not yet buried may have considerable influence on the case in dispute.

In the narrower sense, however, we are dealing here with the case where a debtor has to perform his obligation with a person who is subject to him legally. Let us take as a practical example a contract made with an apprentice. This mutual contract gives rise to the obligation of the apprentice to put his labor power at the disposal of his master, and in this way, with or without tuition fee, to render an equivalent for the instruction he receives. As a rule it is the father or guardian who concludes the contract for the minor apprentice, and hence the question has been raised, who the contracting party is. The answer is that in most cases it is the father who is responsible for

the child and his performance; and it is clear that the guardian does not obligate himself.

We must now apply our principles of *execution*, especially that of *respect*, to this obligation of the apprentice. We must make a distinction in practice. (a) If the father is responsible, his obligation may be limited according to the principles under two conditions. He can not be required to give up the status he has in law as the parent of the apprentice. This must always remain, and the employer must respect it. And secondly he can not be held responsible for the good behavior of the apprentice when he is not given the necessary opportunity to prevent the child's misconduct. (b) In so far as the apprentice is responsible for himself, his obligation has its limits where an attempt is made to misuse and exploit him; especially where his personal services are made use of without regard to the business of his employment, and without doing justice to the main purpose of his training. And it has been properly decided on several occasions that in such a state of affairs there is no need of waiting for the expiration of the time of apprenticeship, probably for the reason that we can not tell beforehand whether he will get an adequate training or not; but that the limit of his obligation to perform service must be maintained all the time while the contract is in force. This fundamental conception of apprenticeship has been adopted by the Industrial Act, 127 to 127b.

We may, in passing, refer to a pertinent decision of the Romans in the law of slavery. An heir was instructed by the testator in his will to give a slave his freedom. To evade this obligation he instituted the slave as his heir. Now the question is, was this slave a "*heres necessarius*"? "*Et humanius est et magis aequitatis ratione subnixum non fieri necessarium: qui enim etiam invito defuncto poterat libertatem extorquere, is liber esse iussus non magnum videtur beneficium a defuncto consequi, immo*

nihil commodi sensisse, sed magis debitam sibi accepisse libertatem" (D. XXVIII 5, 85).

3. The reference of the Civil Code to "good faith" has its widest field of application evidently in performances done with the debtor's property. Empirically speaking, the possibilities may be classified under four divisions, place, time, kind, measure. The variations in particular are innumerable. We shall attempt by way of illustration to cite examples from the best models of the classical jurists.

(a) In reference to *place*. A subsequent change of conditions may make it impossible for the obligor to carry out his obligation. For example when on account of war or epidemic the obligor can not be expected to perform at the place determined by the transaction or by law. But it is also possible that the change merely modifies the place of performance, leaving everything else unaffected. The following is an interesting case (D. XIII 4, 2, 7). The creditor has received a promise that the debt would be paid to him or to Titius at Ephesus. The debtor paid Titius at another place. A dispute arose among the lawyers whether the obligation is removed. Ulpian is right in maintaining the affirmative. The *objective* purpose of the demand was completely attained. To go beyond this and insist on the particular demand originally made respecting the place of performance would be a merely subjective whim on the part of the creditor; and it would reduce the debtor to an object of arbitrary desire, not permitting him in this particular phase of the performance to be an end in himself.

The case is different in the question of the right place for the guarantor to perform his obligation. It is in accordance with the prevailing and correct notion that this need not be the same as the place of fulfilment of the original debt. For it is true indeed that he who undertakes to be responsible for a third person is subject in general to

the same obligation as the original party. But at the same time this obligation must be carried out in such a way that the man who was surety should not be held to more than is objectively demanded by the purpose of securing the creditor. But this would be the case if we desired absolutely to spare the creditor all effort, inconvenience, and disturbance. On the contrary, the creditor must take these inconveniences upon himself and must not treat the guarantor in accordance with his subjective desires, but should hold him responsible only within the limits allowed by the principle of respect.

(b) The question of the right *time* of a performance and the determination thereof in accordance with "good faith" will give us a new result instead of that attained by following literally the indication of the time as laid down in positive law. A good exposition is found in Paulus in connection with the question of the possibility of curing the delay of obligation (D. XLV 1, 91, 3). His analysis is excellent and he decides correctly in favor of the possibility of cure. But he justifies it by the notion that the possessor of the service to be rendered (the debtor) deserves more consideration than the creditor, who demands compensation. This is not convincing. The true reason is this, that the creditor who — without suffering any loss — merely appeals to the circumstance that the other did not fulfil his obligation at the time agreed upon, and is unwilling to permit the delay to be cured, is violating the principle of respect.

This consideration may apply also to our present law of delay, but the question of determining the right time of fulfilling an obligation may be put in advance under BGB. 242. This possibility is specifically expressed in D. XXX, 71, 2: "In pecunia legata confitenti heredi modicum tempus ad solutionem dandum est nec urgendum ad suscipiendum iudicium: quod quidem tempus ex bono et aequo praetorem observare oportebit." BGB.

605 : 3 must be interpreted in accordance with this principle.

The defence of non-performance of a contract (BGB. 320) and more generally the *right of lien* are cases where this consideration may be applied. BGB. 273 and HGB. 369-372 are only attempts to follow out the consequences of BGB. 242 in their definite situations. And therefore a right of retention may be recognized according to the last regulation, which is not given by the first rules; especially when the claims in question do not follow from the *same* legal relation. Thus a contractor promised to build a railway between two cities, and transferred certain parts of the structure to another contractor in three distinct contracts with different content. The Supreme Court of the Empire rightly decided that every one of these three legal relations may give rise to a claim that would justify a right of retention.

(c) Right *kind* of performance. Many decisions of Roman Law which would at that time have been classified under this head were taken up by later legislation by the second method of just law and settled beforehand in universal terms. An example is the responsum of Scaevola in D. XIX 1, 48, which is now represented by BGB. 444. We may mention here especially set-off with counter-claim, which the Romans emphasized in the strongest way as corresponding to "*aequitas*." They were right, in so far as the reason for its introduction was that the creditor suffers no further loss, whereas the debtor has to bear the entire burden by paying and then making a counter-claim. Recent development of the law has recognized compulsory deduction as a legal rule even against the will of the creditor of a main claim, and has taken it up in BGB. 387. Nevertheless disputes have again arisen concerning the well-known exceptions to the admissibility of the right of set-off. This is especially the case in the prohibition of deducting from the cash wages of labor

(BGB. 394; CPO. 850 : 1). There is a difference of opinion whether the wages have to be paid in full even when the laborer or employee deliberately caused the employer damage. Many have answered this question in the affirmative because the creditor of the main claim is as a rule dependent upon his wages for his living. Others on the other hand have properly appealed to BGB. 242. The employer must not, in the obligation flowing from his contract with the laborer, be legally sacrificed to the arbitrary desire of the one bound to do service. But this would be the case if he were expected absolutely to tolerate deliberate damage, with what comfort he may have from the dim prospect of possibly getting in a special action the money he is now paying out. We can make clear the meaning of the above mentioned prohibition of deduction by the proposition that it must not lead to one man in the special community ill-using the other in contravention of the principles of just law (cf. p. 260). In that case we rather must revive the old proposition, "*Dolo facit, qui petit quod redditurus est*" (D. XLIV 4, 8 pr.).

A question was asked in reference to contracts of purchase providing for the supply of certain natural products (grain, potatoes, onions, fruit, and so on), whether in the demand for a certain quality allowance must be made for the failure of the crops. The correct answer was that it is true indeed that in raw products of nature the purveyor can not be held strictly responsible for the quality of every single piece as he can be in products of manufacture and industry; but that nevertheless the obligation of the seller remains to supply as good products as are procurable, even if the crops in the field are inferior to those of other years and the supply of good material is difficult. The justification of this answer must be proved by reference to the second principle of respect.

The proprietor of a house discovered soon after leasing the property that the lessee was a thief, and consequently

refused to allow the lessee to move in. The court decided that the lessor need not permit a man convicted of theft to move into his premises. For in the first place the lessor has a personal interest in keeping such persons away from his house, which may cause him anxiety concerning the security of his property. And secondly the lessor has reason to fear that other tenants of the same property may give him notice of the termination of their lease. The decision is correct and can be justified according to the principles of just law. There was no ground for terminating the lease. But the duty of the lessor is to be maintained only in the sense that in giving over his property he may still be his own neighbor. But this is not certain if he hands it over to a former convict. Further details must be decided by a more precise investigation of the circumstances in the spirit of our method.

In this way too we can justify for example the decisions that the lessee after notice of the termination of the lease must hand his property over for use only so far as to allow visits of those desiring to rent it; and that he is not required to keep the house open at night. And conversely, that the lessee of a dwelling or of a building intended for an industrial establishment is entitled to demand of the lessor the permission to make telephone connections and to be given the declaration of consent required for the purpose. For such an arrangement, which the lessee is willing to make at his own expense, does not affect the nature of the leased object to such an extent that anything is imposed upon the lessor prejudicial to his interests or preventing him in this obligation from remaining his own neighbor without injury to himself or the thing handed over.

The obligation to maintain and improve a road is determined from time to time by the technical means available at a given time. But it will not do to determine the exact details of practice by the mere estimation of the

person entitled or of a board of official authorities. The obligation must be defined in the spirit of the principles of just law. The persons involved are placed mentally in a special community and their claims are so adjusted objectively that the performance holds an intermediate position between the result that would follow from the most strenuous efforts to attain best the particular aim in view, and the weakest performance which may still be regarded as a means to that end.

Errors made by a copyist must not in all cases be charged against him. In a specific case the obligor was employed as writer in a piece of work that lasted a long time, so that he had to copy mechanically. It would be a violation of the principle of right respect to expect an insufficiently trained person to undertake an obligation involving such care as can be given only by a person much better equipped.

In a previous connection we cited the cases treated by Tryphoninus in the theory of deposit (p. 51). We will now solve them. We must first state that it is not the *absolute* duty of the depositary in all cases to return the object to the person of the *depositor*. In accordance with the principles this obligation is limited in such a manner that the depositary shall not be called upon to make further sacrifices. And therefore according to the theory of just law the decision of the difficulty in the case referred to can only be that the deposit be returned to the State force demanding it. Whether its order is to be regarded as just in content; whether, that is, the owner is not thereby treated in an arbitrary manner, is a question that must be decided by itself. The case is different if the object was taken away from the owner not by a decree of the positive law, but by a criminal, who then deposited it. Here there can be no doubt that according to just law the object must be returned to the owner. For in the special community formed by those united in the contract of deposit, the depositor thief would be using the depositary

as a mere tool in the realization of his own criminal purposes; as every one does who arbitrarily breaks the law and then contradicts himself in idea by appealing to its command in his own favor. Nay more, the depositary is liable in an action of trespass (BGB. 990); and hence if he knowingly returns the object to the criminal he can no longer, with an obligation so conceived, remain his own neighbor (cf. also C. III 42, 8).

There has been a difference of opinion in judicial law since ancient times whether and to what extent the depositary is responsible who, in case of a common danger threatening his own property as well as a thing deposited with him, saved his own and thereby failed to save the deposit. The Civil Code has no rule on the matter. The "Report" declares it should be left to the courts and to science. The correct solution is readily suggested by the idea of community. The depositary must go about the act of rescue in the same way in which a member of a partnership would save common objects of which he can secure only a part.

In restitution of dotal property with the "*actio rei uxoriae*" the Roman lawyers strictly applied the ideas developed here (cf. D. XXIII 3, 7 pr.). In Tryphoninus (D. XXIII 3, 78, 2; ib. 78, 4) and Javolenus (D. XXIV 3, 66, 7) in particular we find excellent examples of cases treated in this way.

The duty of the production of evidence was also carried out by the Romans according to "*aequitas*" (D. X 4, 3, 7). And it is clear that it will often be necessary to exercise a proper limitation in connection with the present legal obligation to "produce things" (BGB. 809). An unconditional requirement to produce things may only too easily offend against the principles of respect. On the other hand doubts concerning the manner of rendering accounts (cf. BGB. 259; also 260) may be easily solved in this way, that we must aim at the highest grade of

technical excellence even though it cost the obligor extra efforts. For it does not seem that by observing the greatest care in the rendering of his account and giving the required information in the best way possible, the person responsible is likely to be prevented from remaining his own neighbor. This is also the view maintained in classical law as shown in many applications. I may cite as examples D. XL 4, 22; XL 7, 21; also II 13, 14. Finally let us turn to

(d) *Measure* of the required performance.

From the theory of "in integrum restitutio" the proposition has been formed that "minima praetor non curat." This can only mean generally that in adjusting relations of obligation, trifling elements in the measure of the performance due may properly be neglected, in order to avoid the one-sidedness arising from insistence on the letter of the demand and the subjective desire of the person entitled. In a recent case the proprietor of an estate was charged with illegally damming up the water of a river and preventing it from passing through the field of a neighbor situated on a lower level. His defence was that the damage was trifling; but it was rejected by the court, on the ground that there is no law instructing the judge to regard such an allegation. In questions pertaining to the law of things this ruling holds to-day, as our discussion of the right exercise of rights of exclusion has shown. But it does not hold of the theory of obligations. This comes under the principle of *right* execution, and hence we can not ignore the consideration just made, namely that a principle of just law must not be violated merely for the sake of carrying out an obligation in a mechanically precise manner. There is an excellent application of this to a particular case in BGB. 320, 2. The statement of BGB. 259, 3 is also in agreement with this principle, that "in matters of slight importance one is not obligated to take the oath of disclosure."

From the consideration just mentioned we may also draw the conclusion that when the difference is slight, the buyer who received more goods than he ordered must not simply refuse it without any regard to the convenience of the sender. Just as we can not expect him to go to the great trouble of accepting a large shipment (there was a case where one received a shipment of 30 litres of liquor for an order of 10), opening the cases to take out the amount belonging to him and returning the rest to the seller, so in the opposite case we must see that the above saying, when properly understood and applied, conforms to the principles of just law. The distinction just made may be of interest in technical legal practice when there is a dispute about the amount actually ordered, in the following way. If the receiver is not entitled to refuse the entire shipment by reason of a slight difference in the amount sent, he must be held liable at once in respect to that part of the shipment which he admits to have ordered; while the decision concerning the remainder, which is disputed, is dependent upon the proof-proceeding, and particularly upon the oath. On the other hand, if he had the right to consider the filling of the order, on account of the too great excess, as non-existent, he can not at first be held liable in any amount.

The following case gives a different aspect of the matter (D. XVII 2, 63, 5). Three persons were in partnership. One of them was in possession of earnings which he was to divide with the rest. The second partner brought an action for his share of the profits and received it in full. The third partner then also brought an action, but the first partner having spent all he had, the former was able to get only a portion of the share which was his due. The question now is, Can he demand that the second partner make up for his loss? "*Sed magis est, ut pro socio actione consequi possit, ut utriusque portio exaequetur: quae sententia habet aequitatem.*"

Again; a testator imposed a duty of payment of a legacy upon his relative in the belief that she would be his sole heir. Later it turned out that there were two equally entitled heirs. Papinianus decides that the heiress burdened with the obligation is — “*rationibus aequitatis*” — responsible only for half the amount of the legacy, and the legatee must get the other half from the second heir (D. XXXI, 77, 29). This is in principle true to-day, that the co-heirs must fulfil their obligations in common, and in general share equally. There is a slight difference only in the way it is carried out in practice (cf. D. XXXI, 33 pr.).

The result is different in the following case. A person was injured illegally. And having several ways at his disposal to justify his claim for damages, he chose the one which gave him the least amount of compensation for his loss. The rule in this case is that when he finds out his mistake he may make an additional claim. The defendant must pay the highest amount that can be claimed by law. He can not appeal in this case to the principles of respect; for he was the man who violated them and must now make full restitution (D. XLIV 7, 34 pr.).

In recent times doubts have arisen concerning BGB. 616. The law reads as follows: “A person obligated to perform a service does not lose his claim to compensation by the fact that, owing to a personal reason, he was prevented for a comparatively inconsiderable time, through no fault of his, from performing the service.” Now complaint is made that in many labor laws recently tested an endeavor has been made to make this regulation ineffective. It must be said that 616 is to be understood as being a supplementary law only, and is valid only when the contract contains no provision for such a contingency. But on the other hand every contract for service must be fulfilled in “good faith,” and the private parties can not

set aside this proposition by an act in the law. The only question then is, how our norm is to be carried out with objective certainty.

In this we are aided by thinking of the model and principles of just law. In such cases the persons involved must be united mentally in a special community. The loss arising on both sides must be laid upon the community and divided. The Code properly assumes that considering the bases of our social phenomena as they actually are, the loss endured is not simply and arithmetically equal on both sides — the pay which the laborer failed to earn and the equally great loss suffered by the contractor in work that remained undone. As a rule the situation will be rather this: that when a particular workman is temporarily incapacitated, he undoubtedly suffers a loss, while the industry in which he is engaged feels no loss at all or very slightly. This must be determined in every case and equalized in accordance with the method above suggested. The members of the community that we mentally conceived must bear in common the loss arising on either side — this is the formal method to be followed in every case of dispute. But this is true only, as we said, when the contract excludes the regulation of 616 and must be decided by direct reference to 242. On the other hand when 616 has to be applied, it is also true that the expression “an inconsiderable time” must not be interpreted to mean a simple and absolute limit. The rule must be understood as a whole. It means that the workman must be paid his wages unless his staying away caused his employer a loss equal or superior to the compensation demanded.

§ 3. *Avoiding abuse in family rights.* — The possibility of “abusing” a power granted by law is mentioned in the Civil Code in connection with the seduction of a woman. “Abuse of a relation of dependence” is made a ground for a claim of damages (BGB. 825; 847). The appli-

cation is easy. It is a direct violation of that which is commanded by the second principle of respect. Instead of a community, in which the one party is given an authoritative rôle for the common interest, we have here the arbitrary whim of the person in power. This the law tries to prevent also in the *exercise of family rights*, though only in two places. First, the demand of a husband or wife for the definite fulfilment of matrimonial obligations must not be regarded as "abuse of one's right" (BGB. 1353; 1354; 1357). And secondly, the father must not "abuse" his right of caring for the person of his child (1666). The first is supplemented by certain regulations, such as that the husband or wife must not refuse the consent required by law to a business or occupation of the other, without "sufficient reason" (so BGB. 1379, 1402, 1447, 1451; also in other places sometimes, for example 1308; cf. 549). This appears again now and then as prevention of "abuse" (BGB. 1358).

In these two applications we may miss the *right way of doing a thing* by offending against the principle of *respect* as well as that of *participation*. Thus we may either make an unjustified demand upon the person who is legally bound to us as belonging to our family; or we may abuse him by unjustified exclusion.

1. Avoidance of "abuse" in the relations of conjugal life.

(a) *Principle of respect*.—The essence of marriage consists in the legal association of a man and a woman for the purpose of living their whole life in common. This relation must be conceived and carried out on a mutual basis. "Abuse" takes place when the one party demands of the other complete surrender without being willing to grant the same in return. The moment we think of the obligation of the one party as *one-sided*, and expect him to make a one-sided sacrifice without receiving from the other party in return his complete surrender in the spirit of the conjugal community, the demand is "abusive" and

objectively *unjust*. For it is only by the mutual granting of the personality that we can justify the obligation of every spouse to surrender himself or herself to his or her partner. Only in this way can each of the two legally united parties remain his own neighbor.

This relation is violated when the one party refuses to surrender himself unconditionally (in case of deliberate infidelity, for example), and also when he is not able to do so. He may *say* perhaps in such a case that he is ready to fulfil his obligation, but his assertion is disproved by his *acts*, which show clearly that he is not capable of objective surrender, and that his demand can only be the result of subjective desire. And we must note also that it does not follow that for every single error of which a spouse may be guilty the obligations of the other party are at once limited. The decisive thing is not so much the particular act in itself as the weakness which it represents or gives evidence of, rendering doubtful the possibility in the future of maintaining a proper conjugal life.

As in the types of performances, so here also the one party to a marriage relation may have unjust demands made upon his person, upon persons legally entrusted to him, or upon his property. The first is the most important here. The Corpus Juris offers a few striking examples, a contractual penalty when a married man again receives his former concubine (D. XLV 1, 121, 1); or hires out his wife (C. IV 7, 5). Corresponding examples are found in modern practice. The Code itself refers to grounds of divorce as consisting in conduct that is *unjust* to the other party. These are placed formally *next to* "abuse" of the conjugal right to live together (BGB. 1353); but in reality the former are nothing but genuine examples of the latter, which, as the more general concept, necessarily embraces them also. An example of improper liability with persons entrusted to one would be in case the wife has young children from a former marriage. These chil-

dren, when the mother marries again, are no longer under her parental power, and yet she has still the right and the duty to care for them (BGB. 1697). Of small importance in this connection is the possible abuse in administering and disposing of property according to the rules of the property rights of married persons inter se. The rescissory action at the disposal of a married woman and the means she can employ to safeguard the property she brought with her, are regulated as technically formed institutions. The question of "abuse" is treated in BGB. 1358 and the parallel passages cited above. There is such when one refuses assent though it would not injure the community of marriage. The only thing that justifies the refusal of a legally required consent is a well-grounded concern that their common life and the mutual devotion will suffer.

(b) *Principle of participation.* — Here belongs a remarkable lawsuit which occupied the Seine court at Paris not long ago. Dorotheé Louise Valencay de Talleyrand-Périgord, wife of Count Jean de Castellane, brought an action against Jeanne Seillière, wife of the Duke of Talleyrand-Périgord and Sagan. The object of the action was, that the Countess Jean de Castellane desired that the court make it permissible for her to visit her brother, the Duke of Talleyrand-Périgord and Sagan. In her statement the plaintiff declares that the relations between her brother and herself had always been so intimate that the duke was always glad to see her in his house; but that the defendant was opposed to these visits and closed the door in her face, an act that could be proved by witnesses. For these reasons the Countess Jean de Castellane desires to have the authorization from the court to be permitted to visit her brother at any time. Now it is clear from what we said before concerning the exercise of rights of exclusion, that such an action would not be maintained according to the civil law in force in our land.

2. Avoidance of "abuse" in the *exercise of parental power*.

(a) *Principle of respect*. — The parental power of modern law is simply a special kind of wardship. The relation is no longer characterized by the right of personal authority and submissive piety, but by that of protection and defence of a minor citizen. The consequences drawn in earlier laws from the duty of absolute reverence, which are seen also in the law of property (cf. D. XLIV 4, 4, 16), are no longer valid. The specific formulation in the present Civil Code, the occasional reminiscences of ancient times, and in particular the legislative inconsistency of parental usufruct, must be left out of account for the present.

Accordingly there is "abuse" of parental power whenever the father discharges badly the obligations of the guardianship that have fallen to his lot. The Code says in this connection, "is guilty of dishonorable or immoral conduct" (1666). But the two expressions (cf. GO. 134c, "feeling of honor or good morals") can scarcely signify any real difference. For "dishonorable" can only denote something independent of "immoral" if we are thinking of the "honor of chivalry," which is surely not the meaning here. The latter is a positive institution according to *conventional* rules. It holds only among "knightly" persons and those "capable of knightly valor" and not among others. It denotes therefore nothing more than membership in a privileged class governed by certain conventional rules. And the satisfaction that is given in the passage at arms consists in the recognition of the opponent as belonging to the "knights." This "honor" is therefore parallel to and independent of *legal* and *moral* valuation, and as long as the medieval tradition persists as a *conventional* institution, it can not be protected by *legal* measures; as is the case in the conceptually different "civic honor," which is diminished by "unethical conduct." If therefore despite this the Code chose to be redundant in

saying "dishonorable or immoral," the explanation can be found only in the narrow meaning sometimes given to the word "moral." In ordinary life this often means only sexually correct (p. 49). This restricted meaning the law did not intend to convey. And to obviate a possible misconception, the expletive "dishonorable" was added to indicate that the father in the exercise of his parental power must not act *unjustly*. He would be guilty of doing this if he should use his legal status in his own interest only and not in the interest of the child, taking advantage of his position to use the former as a means to the father's ends. And his conduct would earn those epithets in so far as he regularly and habitually lives and acts in opposition to the principles of just law.

This is also the place to take up the question recently discussed concerning the giving of offensive names to one's child.

(b) *Principle of participation.*—A wife had properly separated from her husband and refused to return on account of his objectionable mode of life. She gave birth to a child. The father had the right of parental power, and demanded the child from the mother. But in culpably keeping away from the newly born child the care of a mother (BGB. 1634), there is, according to our second principle of participation, an "abuse" of parental power toward the child. The mother therefore, while not entitled to refuse to give up the child, had the right to ask the orphans' court to take the proper steps to avoid abuse and secure the proper care of the child (according to BGB. 1666).

§ 4. "*Practicability.*"—The Civil Code refers to the *practicability* of a proceeding as determining its justice. This is found in two applications. First, we are told that the orphans' court and the court of probate must hear certain persons before making a decision, if "practicable." This is in accordance with BGB. 1673, 1690, 1826, 1827;

1996, 2216, 2227, 2260, 2360, 2368. It is a question here of gathering as completely as possible the material that is required in the case. Whether it is "practicable" or not will therefore depend upon the value which this completeness has for the technical purpose in question. The means adopted must not demand greater sacrifices than the advantages to be derived through it. In some specific cases the Code has also indicated in a few words concretely what its meaning is. When the hearing is possible, we are told, "without loss of time and without considerable cost" (1308); "without considerable delay and without disproportionate costs" (1673, 1847, 1862, 2200). Cf. also BGB. 1726, 1735, 1746. And passing over to a completely technical formulation, BGB. 1990 speaks of the case where "the administration of a decedent's estate or the opening of the bankruptcy proceedings against it is *not practicable* owing to the lack of money to cover the expenses." Accordingly these cases do not properly belong to the questions we are discussing here.

The other use of our expression is found in connection with the exercise of relations based on obligations and real rights. Another person who is likely to suffer loss through this exercise must have the opportunity to take certain steps on his own account. The proceedings must not be undertaken without regard to the interests of the person involved. The latter must be placed in a position where he can remain his own neighbor. He must not be passed over or kept in ignorance and yet be burdened with obligations or find himself in a certain way excluded. Such loss may be found in obligatory relations as well as in real rights.

In many cases of this class our Code gives a technically formed rule. Compare especially BGB. 545, 1042. In other connections again it refers to *just law*. Notice or warning of an expected proceeding should be given when it is *objectively justified*. The manager without authority

must notify the owner "as soon as practicable" that he has taken over the management of the business (BGB. 681). In the other cases where a notice or warning is required by law the Code first lays down the duty of communicating the information and then adds that this "need not be done if it is impracticable." The cases are BGB. 303, 374, 384 (HGB. 373), 1128, 1166, 1218, 1220, 1234, 1237, 1241, 1285.

In this way we are again directed to the right method by which the legal relations in question may be properly carried out. The important point in this group of cases is to afford the other an opportunity of caring for himself. In the *special community* in which we mentally place the parties involved, the principles of *just execution* require that in affording the opportunity above mentioned, the agent undertakes the *work* while the person benefited defrays the *costs*. For since we are speaking of *objectively just* conduct, we must avoid all one-sidedness and lack of regard and concern for the other; and hence we must also do positively what is necessary in opposition to such one-sidedness. Now since, on the other hand, the only purpose of notifying the other person is to further his advantage, it is right that he should bear the necessary financial expense. Thus Ulpian in the well-known fragment concerning a creditor's delay in performance says very truly, "Effundere autem non statim potest, priusquam testando denuntiet emptori, ut aut tollat vinum aut sciat futurum, ut vinum effunderetur . . . commodius est autem conduci vasa, . . . aut vendere vinum *bona fide*: id est quantum sine ipsius incommodo fieri potest operam dare, ut quam minime detrimento sit ea res emptori" (D. XVIII 6, 1, 3).

And the notice or warning would be "impracticable" if it should cost more trouble and expense than it is worth to the person in whose interest it is done; a matter that can be easily computed if we bear in mind the considerations just adduced.

The question now is, Are those twelve cases of the Civil Code the only ones where it is necessary to have regard for the other by giving him certain information? The answer is, no. They must be supplemented by the universal and fundamental prescription of execution according to good faith. In those cases the law itself calls attention to the fact that *just* execution may involve also the trouble of giving notice. In other cases it is silent and refers those cases therefore, so far as the law of obligatory relations is concerned, to the norm discussed above, which requires that the performance be *just in principle*.

The method to be pursued is therefore the following. We must first determine according to the above law of "good faith" (for which the isolated instance of BGB. 1288 uses the expression "practicable") whether the obligation to perform a thing as required by objective justice embraces also the trouble of notifying the other partner of the mental community. We had examples of this before when we said that it was necessary to inform the father of the bad behavior of his apprenticed son, and to inform the workman of the danger involved in attending to the animals or the machines. We may also add the following. A steamship company undertook to furnish a steamer, or a teamster to furnish a wagon. By reason of untoward circumstances they found it impossible to carry out their promise and neglected to inform those who had given the order. We are justified in saying that according to "good faith" they did not fulfil the obligations of the contract. They did not treat the other party of the special community in such a way that he could remain his own neighbor; but had an eye solely to their own interest and situation at the moment. Thus we see that when a person finds it impossible, through no fault of his, to perform a service he has undertaken to do, it becomes his duty to notify promptly the other party.

In a contract of lease the term was to begin as soon as

the present tenant vacated the dwelling, which was to take place in a short time definitely determined. The tenant moved out in three days. The lessor did nothing, and said later that it was the business of the lessee to find out when the house was vacated, and that the rent was due then. This is wrong; and the reasons are the same as those advanced in the cases mentioned before.

But though we have just seen that according to "good faith" there is a duty to notify, still we must remember that this duty need be carried out only if it is "practicable" to do so; otherwise reason might become nonsense, and a benefit turn into a curse. Every case must be considered, and the advantages and disadvantages carefully balanced in the same way as the law instructs us to do in those twelve cases where we are expressly directed to give notice or warning where "practicable."

§ 5. *Determination in accordance with fairness.* — When a person appeals to "fairness," it may mean in the first place that he maintains the objective justice of a legal demand. When one says, this is no more than "right and fair," he means that the thing in question is justified not merely from the point of view of positive law, but also from that of *just law*.

But there is a special group of cases where we make reference to "fair" judgment within the sphere of *just law* itself; such cases, for example, where there is no fixed boundary line between the disputing parties, from which we must positively start (p. 32). It is a joint domain (in a wide sense), and the two parties in dispute claim each a part. But it is quite an open question and so far undetermined in any way, how much shall be assigned to each one. Now it may be that neither of the two as yet possesses anything of the legal sphere in question, or it may be that one of them has to give up something, but there is so far no basis whatsoever for determining the line of his duty.

This element of initial indetermination in the extent of a right or privilege has often occupied the minds of legislators and writers and, we may say, has caused them no little embarrassment. The Romans hit upon "*iuramentum in litem*" for arbitrarily estimating a damage (D. XII 3, praes. 5; cf. XIII 6, 3, 2). The damage must be there, fully established; and it must not be a question of a definite sum of money. Then there are certain rules, the details of which do not interest us here, according to which the plaintiff may state under oath the magnitude of the damage. This has something of the nature of a judgment by ordeal. It signifies in fact that the judge renounces his own right of considering the case and confesses indirectly to incompetence in method. Modern legislation, as is well known, has allowed such oath to die a natural death.

Among modern legal philosophers Kant has more than any one else considered the peculiarities of "fair" judgment. He properly lays stress upon the fact that a person who makes a certain claim on the ground of fairness appeals to his *right*; and does not consider his claim as a request for *arbitrary* favor, nor as a petition for *grace* (p. 110 f). But he doubts that a court of justice is able to render a decision in a person's favor in the name of "fairness." His examples are noteworthy. "A servant who was engaged for a year was paid in a coin that had deteriorated in value since the time of the contract, so that he can not now purchase as much for his annual wage as he could at the time the contract was made." Now, says Kant, "as long as the servant is paid the amount in money units agreed upon, though the value is now less, he can not appeal to his right to be protected against such loss. He can only invoke the aid of fairness, a dumb goddess, who can not be heard, because there was nothing definitely said in the contract about this; and a judge can not take into account conditions which are undetermined."

But suppose the positive law makes it the duty of the judge to decide whether a given understanding is in accord with "fairness," or perhaps directly opposed to it. Here the judge can not evade the matter. And it is not necessary that he should, if we bear in mind that we are dealing with an arrangement to be made according to *just law*, of which "fairness," as understood here, is simply a practical application in circumstances of a particular nature. Our aim will therefore be attained and our practice will have a method at its disposal as soon as we mentally unite the parties involved in a special community according to the model of just law, and then arrange their differences according to the principles of the right execution of legal relations.

Following is an attempt to express this idea in an empirical formula.

1. *When rights of exclusion are in conflict, they should be divided.*

This takes place in accordance with BGB. 1024 and 1060 (for which case the same provision was already made in D. VII 1, 13, 3); cf. EG. 184. It is also very important in confusion of boundaries, according to BGB. 920. "Equitable" decision takes place when the boundary is really uncertain, so that there can be no question of one of the two having a larger part in the area in dispute. Here there is a simple process available, known and exercised in ancient times. *One of the two parties entitled makes the division according to his best judgment, and the other chooses one of the divisions.* This is the only process that is in accord with the method here taught. According to this the two persons entitled form a mental community with regard to the area in dispute; and each one is to receive his own in such a way that he can remain his own neighbor in the division. *Each one of them* must have this privilege. We are dealing here with the second principle of participation, where each of the two must be

partly excluded. Now no one can be sure that the adjustment will be objective and impartial unless both co-operate equally in the arrangement. And the method above mentioned seems from experience the only possible one that meets the requirements.

The first application of this process that we know was probably the division between Abraham and Lot (Gen. 13, 9-11). We find it used with especial frequency in the German legal sources of the middle ages in the division of inheritance (see especially "Sachsenspiegel" III 29, 2). And Gaill reports in his Observations (1578): "Ex generali quadam Germaniae et in Camera approbata consuetudine receptum est, ut senior frater divisionem pro suo arbitrio bona fide et ex aequo faciat et minor natu optionis et eligendi praerogativam habeat." But in later times this was replaced again by the pure Roman law, according to which the judge himself was to decide and make the division without receiving any objective instructions from the law. It is not without interest, however, to note that now and then the idea here emphasized emerges. Thus in the Prussian law concerning tithes; ALR. II 11, 895, "The receiver must take the tithe upon the field, from the standing sheaves or heaps *as they follow each other in order*. But he can begin counting wherever he chooses."

In general the question is, Which of the two is to divide or to choose? The first decision is made by agreement. Or the judge may possibly find that for technical reasons one of the two is better fitted by his knowledge to make the division, and instruct him to do so. In canon law in a similar case when two bishops are in dispute about a bishopric, the one who held it longest is appointed to make the division, and the other does the choosing (X. III 29, 1). In cases of necessity, however, there is no other way to decide the respective rôles except by lot.

2. "*Equitable*" determination in deciding cases of obligation. The Civil Code makes use of this in four ways.

(a) *Equitable determination of an obligatory performance that has so far remained undetermined*; either by one of the parties involved or by a third. The knowledge of the laws governing undetermined performances in obligatory relations is presupposed; especially BGB. 315-319, 2048, 2156. Here the interesting question is, By what objective process shall the indetermination be removed, in order to accord with "equity" and not be clearly "unequitable"?

Without wishing to be pedantic, we repeat: The parties involved are united into a special community with the common purpose arising from the union of their interests in the legal relation in question. And now the still undetermined contribution of the one side is estimated according to the shares invested by the two parties in such a way that in carrying out these performances in detail he whose performance is already determined may remain his own neighbor without having to make a one-sided sacrifice. In mutual contracts this would direct us to go back to a sort of market price. But it also suggests that we must take into account, in special cases, matters that can not well be weighed or measured; for example, the circumstance that the disputing parties have been associated in business for a long time; or that there are or have been relations of kindred or friendship between them; or that one of the parties derived certain indirect advantages from the business by reason of certain accompanying and subordinate circumstances.

In the case of physicians, the Industrial Act 80 makes the remedy independent of the standard rate of charges, which may be used, in the absence of a definite agreement, to determine the fitness of the price. But the difficulties mentioned above are not altogether excluded thereby by any means. And any day may bring among us a lawsuit similar to the interesting case that took place in Paris not long ago. A small grocer in Nanterre by the name of

Liboz called a city physician, Dr. Vincent, to treat his sick wife. The physician decided after an examination that the case was a very serious one and that it required a very difficult surgical operation, which he could not himself undertake. On the advice of one of his customers, Mr. Liboz went to Dr. Albarran, a physician in a Paris hospital, and asked him to perform an operation on his wife. The young wife of the grocer was brought, by the physician's order, to a sanatorium in Paris, where he performed on her a difficult operation and saved her life. A few days later the surgeon sent the grocer a bill amounting to more than 6000 francs. Mr. Liboz was frightened. His rent amounted to 800 francs, and the small business which he bought cost him 4800 francs. He could not pay the sum required, and an action was brought against him. At the hearing the attorney for the plaintiff charged Liboz with ingratitude toward the surgeon, who saved the life of his wife. He argued that there were public hospitals for patients who can not pay, and that the great surgeons were doing enough gratuitous work among the poor as it was. It was natural therefore that those who called them for their own special use should pay them specially for their services. Hereupon the attorney who was defending the grocer replied that Liboz called Dr. Albarran to operate on his wife but not to fleece him. He maintained that there are certain limits beyond which not even the "Princes of Science" have a right to go in fixing their prices. A surgeon's fee, he said, must be determined with reference to three factors: 1. The authority of the physician who calls him 2. The seriousness of the disease. 3. The income of the patient. The court took this argument into consideration. It emphasized the fact that it is the duty of the physician to regulate his fees according to the means of the patient. And in consideration of the arguments advanced by the attorney for the defendant, the court reduced the charges more than half.

The same method is observed in undetermined performances arising from the terms of a will and testament. Here the heir and the legatee form a mental community, which has to carry out the will of the testator in his bequests. This specific purpose of the testator's will must in such a case be isolated and made clear. And the person charged must effect its carrying out in such a way that he shall always be treated according to the second principle of respect, but at the same time he must, on his side, avoid all that is subjective and arbitrary (cf. BGB. 2155). A beautiful decision is given by Scaevola in his *Responsa* (D. XL 5, 41, 4). It is possible too that the right execution of a bequest may be combined with that of a mutual contract, as for example when the testator directs his heir to buy or sell something at a suitable price (D. XXX, 66).

This consideration receives a special form in the case of undesignated shares in a concrete partnership, especially such as has in view the acquisition of property. To be sure, Kant thought here also that it is not possible to decide in what way the claim is to be satisfied. "A partnership is formed by several persons with a view to receiving equal profits. One of the members did more than the others and at the same time, owing to unfortunate accidents, lost more than the other members. From the point of view of 'equity' he can demand more from the association than merely an equal share with the rest. But since a judge in his case would have no definite data for determining how much is due to him according to contract, it follows that according to strict law his demand must be rejected." Nevertheless the Roman lawyers had a carefully thought out *responsum* on this question, which regularly ends with the words, "*Illud potest conveniens esse viri boni arbitrio, ut non utique ex aequis partibus socii simus, veluti si alter plus operae industriae gratiae pecuniae in societatem collaturus erat*" (D. XVII

2, 6; 76-80; cf. 29); a sentiment as a rule certainly more just than the modern rigid rule as found in BGB. 722.

(b) The same idea as the one last mentioned must be employed when several persons bring about the result for which a reward is offered (BGB. 660). Here, too, the several workers form a special union in accordance with the model of just law. The purpose which we must assume as common has been attained. Accordingly the common profit must be divided according to the share each one had in the efforts which led to the desired result; the efforts to be measured and estimated according to the particular situation in the sense of a rightly calculated exchange value (p. 227). There is no occasion for a mechanical application of the rule quoted from BGB. 722. Accordingly the proper decision in this case is that of the classical jurists quoted above.

(c) *Management, use, and realization of monetary value of an object in which a number of persons have a legitimate interest.* This appears now in community of ownership (BGB. 745; cf. 752) and in sale of a pledge (BGB. 1246). Here the peculiarity consists in the fact that the two parties mentally united in the special community are so related to each other in respect to right and duty that both power and obligation are still undetermined. Accordingly if the decision is to be well founded, the principles of the right execution of legal relations that are pertinent here must be strictly utilized and their influence brought to bear upon the judge's trend of thought, so that every one of the parties may be taken account of as involved in the whole. In considering the case, the unitary purpose of the community must be emphasized in contradistinction to the special interests of the individuals. The concrete measures, however, which thus become necessary, must be indicated (though this must be done in creative subordination by the deciding judge) in this formal method, namely that all desires of the one or

the other party that can be seen to be of subjective value merely, must recede in the background; and that each one of them must be respected in his desire for the specific purposes in question within the special mental community, and must be able to be an end in himself. In this sense Ulpian could say with propriety: "Aequissimum enim visum est creditorem ita agere rem debitoris, ut suam ageret" (D. XLVI 3, 1).

Here belongs also (according to BGB. 752) the provision that the one co-owner may with perfect propriety desire the personal use and possession of the family estate provided this does not entail any further personal sacrifice upon the other party, but allows him to promote his own interests while carrying out the desire of his partner. Or the provision (according to BGB. 1246) that the pledgor may have the possibility of recovering the sold pledge. And it follows also, according to an exposition of Ulpian, that the creditor has no right, without the consent of the debtor, so to increase the value of the pledge by improvements that it becomes hard for the debtor to redeem it: "Puta saltum grandem pignori datum ab homine, qui vix luere potest, nedum excolere, tu acceptum pignori excoluisti sic, ut magni pretii faceres; aliaquin non est aequum aut quaerere me alios creditores aut cogi distrahere quod velim receptum aut tibi paenuria coactum derelinquere; *medie igitur haec a iudice erunt dispicienda, ut neque delicatus debitor neque onerosus creditor audiatur*" (D. XIII 7, 25).

(d) *Estimation of an interest that has no general property value.* This is the question in BGB. 847 and 1300 as a development of 253; also according to 1579; and it is applicable also to 971; note also 343. In these cases the definite rates which are required for satisfying a demand are wanting. And it is in fact impossible in all cases to come to a precisely exact determination. There will always be a certain margin of uncertainty.

An edict of the curule aediles announced that no one is allowed to keep dangerous animals where people are accustomed to walk if thereby an injury is likely to occur to any of the latter. If this edict is transgressed and a free man loses his life in consequence, the person responsible is condemned to pay 200 solidi, "Si nocitum homini libero esse dicetur, quanti bonum aequum iudici videbitur, condemnetur, ceterarum rerum, quanti damnum datum factumve sit, dupli" (D. XXI 1, 42). But none of the commentators adds any practical material or proposes an objective method for working out such cases. I should propose the following method of solution.

The injured and the injurer must be thought as belonging to a *separate community* representing the idea of a just social life. They were united in order to live and to work in common in a *just* manner. This may apply to life generally or to particular interests common to the two parties in question, as for example, preparation for marriage during the state of betrothal or living a good life in common during the married state. Now when one of the two breaks that relation and makes use of the personality of the other as a means to his purely personal ends, he must rectify this unjust conduct. There has arisen in the mind of the injured party a well-justified feeling of dissatisfaction which, according to law, must be eradicated in a carefully thought out and objective manner by the payment on the part of the offender of a sum of money to the injured party. If we were to consider the personal ill-will and hate of the injured party, our demands would be extravagant and unreasonable. The person obligated to make reparation must pay a "fair" indemnity, *i.e.* such as is in accord with *just law* when the interests of *both* parties are considered. We must therefore take account of his position and determine the amount of the indemnity accordingly (placing his relatives and dependents in a system of concentric circles about him; cf.

especially BGB. 1579); always observing the second principle of respect. The injury done can really not be wiped out with money — this was the presupposition from which we started. And the offended feelings of the injured party know no limit in their personal resentment against the offender. Such a limit can be found in the case in question in an objective and well justified manner only if the judge so saturates himself with the spirit and method of the principles of just law that he can be independent in the process of subsuming the given case under the proper principle. He must go so far in putting the guilty party at a disadvantage in favor of the party unjustly treated by him, until the idea of a community of persons mutually and equally respecting each other's right purposes shall appear to be re-established again after the previous violation.

We should have to follow a similar method in granting an indemnity by law without declaring the defendant guilty of blameworthy conduct. An action of this sort took place not long ago in Italy. General Buffin, who took part in the funeral celebration of King Humbert as representative of Belgium, had his leg injured in a great railroad accident near Rome, and demanded an indemnity of a half million lire, while the railroad desired that the sum be diminished by one-fifth. Here the common aim of both was the specific money payment of the railroad. Now if the law lays the responsibility of the carrier's trade upon the shoulders of the company in making them pay damages for accidents, this measure can be regarded as just only so long as the obligor is not thereby prevented from pursuing his right purposes. A demand for damages which if made general would make impossible the pursuit of the undertaking (in the manner required under present social conditions) could not therefore be regarded as "equitable."

Finally, as concerns the granting of a reward according

to equitable judgment to the finder of an object which is of value only to the person who lost it, the finder must present his claim in the typical community of loser and finder. And this claim must be defined in the interest of the loser who owes it, according to the spirit of the second principle of respect. A point of support may be found, to start with, in estimating the market value (p. 227) of the finder's performance itself. But there may be cases in which we should have to estimate the reward even lower than this, as for example if the circumstances are such that the loser is disposed to do without the object rather than pay the reward demanded (cf. BGB. 683). The finder naturally is assured of the other rights so far as they are waived by the loser.

CHAPTER TWO

LIMITS OF FREEDOM OF CONTRACT

§ 1. "Uti lingua nuncupassit, ita ius esto." § 2. Transactions in violation of a legal prohibition. § 3. Transactions in violation of "good morals." § 4. Inadmissible transactions positive (misfeasance). § 5. Inadmissible transactions negative (non-feasance).

§ 1. "*Uti lingua nuncupassit, ita ius esto.*" — This theme has not been worked out much hitherto. The idea of *Freedom of Contract*, as a basis of social economy, has indeed been accepted in all social systems that have an interest for us; and the necessity of putting down definite limits to this freedom has been clearly observed since ancient times. Nor is there a lack of material — its extent is enormous — of practical cases and problems in which the question has been raised of the *right* manner of drawing those limits. But no one has succeeded as yet in securely basing the solution of this problem upon firm principles; and the decisions present the picture of discreteness and discontinuity. The unitary idea under which the disputed questions are brought is wrapped in mist; the particular statement seems to come from a personal and accidental feeling; and the various decisions do not show as a rule any systematic connection. This condition will be improved by the theory of *just law*.

The concept and significance of *Freedom of Contract* must be derived from the section dealing with the means of *Just Law*. Its application forms a contrast to centralized economy and takes the place of a legal institution by the side of private property and private inheritance. In virtue of it the law allows its members the right to enter into

specific associations among themselves, the formation, execution, and dissolution of which exhibit the movements of social co-operation. In contradistinction to the centralized order as the only means of obtaining a right legal content, we now have the free use of these possibilities. And the law takes up into itself these resolutions of the individual members, the obligations which they took upon themselves in reference to family relations and the production of commodities, the business of exchange and the permission to use an object, and forces them in case of necessity to keep their word. An express declaration of this fundamental institution is seldom found in particular legislations. The proposition of the Twelve Tables quoted in the title of this section forms an exception. So far as we can see, the only other mention is found in the Constitution of the United States of America, "No State shall . . . make . . . a law impairing the obligation of contracts" (Art. I, sect. I). Otherwise we find it only in particular applications (BGB. 1937-1941; cf. 1432, also 305; etc.).

It follows already from this in a general way that the expression *freedom of contract*, which has long been in use, must not be understood in too literal a sense. It embraces also the possibility of *unilateral* acts in the law. We may, for the present, name as examples belonging here, nullity of a note of debt to the holder which was brought into general circulation without the permission of the government (BGB. 795, 3); bequests offending against a legal prohibition in force at the time of the succession (BGB. 2171). Compare also BGB. 2263, nullity of the testator's prohibition to open the will immediately after his death.

Now it is plainly evident, and we shall not discuss it here in detail, that if we allow absolute freedom of transaction, there is danger that the law may fail of its main purpose, namely, that of exhibiting *justice* in the contents

of its propositions. We are historically justified in the assumption that on the whole freedom of contract as described will produce a right result in the average number of cases. For the opposing interests are in most cases equalized and the result is as described. But there is no guarantee that this will be the case. And not merely this, but it is clear that there will always be the possibility of the personal pleasure of the individual coming in conflict with objective justice. And thus we are again driven to *limiting the freedom of contract*.

We now see that the concept of freedom of contract and its objective significance are established and made clear by the distinction between a *centralized economy* and the idea of *free contributions*. And in the same way an understanding of the limits to freedom of contract is dependent upon the distinction between *justice* and *leniency*. To obviate the evil consequences of a legally secured freedom of transaction, the law may again use two different methods. The law may itself express the formula and indicate where such a boundary line should, in accordance with justice, be drawn; or it may leave this to investigation to find the solution in a given case in accordance with the idea of just law. Our Code gives simple and direct expression to this distinction. It says in 134, "An act in the law which offends against a legal prohibition is void, unless a different conclusion may be drawn from the prohibiting law." And in 138, "An act in the law which offends against good morals is void."

The first represents the process of a *just* law (p. 193) which undertakes of itself to formulate in *technical* terms the rules which are ultimately decisive. According to this method a series of particular propositions are set up as a court of last resort to which one must appeal when a question arises concerning the permissibility of a certain legal transaction. And technical doubts are the only ones possible in subordinating a given case under those

conditional propositions. The second denotes an order of *lenient* law (p. 193). According to this, the material under discussion must be determined according to the *principles of just law*. For this is what the traditional expression, "good morals," denotes (p. 36).

Under all circumstances, however, when we speak of the limits of freedom of contract, we are dealing with the proper application of a *legal norm*. To judge a legal transaction according to the *principles of a just law* is also a *legal* decision. And when the law refers to this method of finding a judgment, and the court does not apply those principles, or does not apply them right, there is a violation of the *law*. And therefore, according to the prescriptions of the German law of civil procedure, the legal means of revisory appeal is admissible here also.

The opposing view holds that this is a question of *morality* and not of *law*. This is an error. The limits of freedom of contract in legal transactions are always questions of *just law* and not of *ethical doctrine* (p. 40). For it is a problem of justly regulating the *external conduct* of those living under the law, and not of forming their *good intentions* in relation to each other. Now since *just law* is only a special kind of *positive law*, and the reference of the law to "good morals" is merely a specific means of securing a just content in its own legal statute, it follows inevitably that going wrong with respect to that instruction constitutes a violation of the *law*.

This process of reasoning must be followed here also in our systematic endeavor to solve our problem. We repeat: When we speak of legal transactions "against good morals," we do not refer to the commission of a *moral crime*, which takes place in the mind and heart, but are dealing with a question of *just law*. We must not therefore in such a case look for a court of appeal outside of the domain of law, but on the contrary, we must see to it that the particular legal transaction is not in opposition to the

fundamental problem of law in general. Whether a transaction in violation thereof is called "negotium turpe" or "inhonestum" or "contra bonos mores," or something else is, for our present trend of thought, as immaterial as the question whether the particular case under consideration and waiting for a decision has already occurred in a similar way before and has perhaps by a certain custom been approved or condemned in this place or in that (p. 36).

The only norm which may be justly selected here as the highest principle is the idea of just law. And the propositions which must not be offended against, and the violation of which would not be "good morals," are the principles of just law. By making these clear and carrying them through in detail, we shall be able to arrange systematically and to master the manifold problems confronting us here. Accordingly we must undertake this systematization, which means a study of *the law* in its possible content.

Morality does not *bar* the law. In its problem of effecting the *right conduct* of men, the law can not be limited or restricted by questions of ethical doctrine. The latter *supplements* the law in that law represents an attempt to compel right *conduct* by force, whereas ethics is the doctrine of purification and perfection in *character and motive*. If we distinguish clearly between law and morals, there can be no such thing as an "immoral contract." A person offends against the *moral law* if he is not pure in his thoughts, desires, or character. But the man who, by his declaration, compels the carrying out of an obligation by himself or others; the man who by his conduct ill-treats and abuses himself or others, violates the idea of *just law*. The one or the other of the contracting parties may at the same time commit a *moral* wrong in their inner consciousness. But the *content of a contract*, as the now existing norm of a certain external conduct, can be *legally unjust*,

but never "immoral" in the true sense of the word (p. 48).

As far as our present investigation is concerned, the only relevant problem directly is, In what way we can find a completely methodical treatment of those legal transactions offending against "good morals," by making use of the model of just law and its principles. But at the same time it will be necessary first to take a glance at those transactions which are in violation of a "legal prohibition"; in order to have a clear notion of the domain of the former by marking them off from the latter. Before doing this, however, I wish to call attention in general to the following points.

In our problem we are dealing in every case with the *content* of a legal transaction, which must be intrinsically inadmissible in principle in order to make void the declaration of will at its basis. For it is this content which the law is expected to recognize and bring to realization. It must therefore take it up into itself as its own; and hence it must first subject it to the necessary test, whether as a specific volition it is in agreement with the law's whole problem. In doing this it must consider the content of the transaction as such; and in particular avoid a division of this content into a main transaction and an added inadmissible condition. A conditional transaction is in the meaning of our law a transaction of a specific kind. Accordingly the question can only be whether as a result of a condition (in the technical meaning of the expression) the content of the transaction becomes inadmissible or not. Modern law does not know the peculiar method of Roman law, which, in acts "*causa mortis*," struck out the inadmissible condition and kept the rest of the disposition. According to modern law, finally, it is also immaterial whether by the specific condition is meant an obligation, the fulfilment of which can be the subject of an action, or whether it is a condition upon which the status of

the legal relation is dependent. This has often been discussed in connection with the clause of eviction in contracts of lease, which may be either a condition subsequent of the lease or a condition precedent of the right to terminate the lease. But for our question, as said before, all this must be considered by the same method.

Defective origin, on the other hand, is to be considered in a different manner. When the only thing that is found fault with is the manner of origin of a legal transaction, the proof has nothing to do with the question we are considering. This applies especially to the avoidance of crafty deception, illegal determination by means of threat and the like, which we shall meet when we treat of the origin of *Duties of Just Law*.

But may not the *content* of a transaction offend against *just law* by reason of *defective motives*? The legal transaction would then be inadmissible whether we refer it to a "legal prohibition" or to "good morals". Must the transaction be really taken in complete isolation, so that its content is not at all affected by the purposes which led to it?

Judicial administration vacillates in this matter. The question had to be taken up in many various aspects, of which we shall name some: Loans or securities to enable the debtor to engage in forbidden games of chance; sale of weapons to a person whom the seller knows to be planning murder; lease or other mode of granting a house for the purpose of carrying on a brothel by the person acquiring the house; the last, with the additional circumstance that an action for damages is supported by the fact that the defendant, in violation of a contract, sold to a third party a house that had already been sold to the plaintiff, and in which he could have established a brothel and earned a great deal of money; or a case where an agreement was entered into for withdrawing from a transaction executed on both sides, by which a dwelling

had been leased for a brothel. Other cases of this kind were, conclusion of a sale, the purpose of which is to furnish the spouse making the sale with the means of deserting his wife; or the case of a loan made to a married woman to induce her to leave her husband and go with the person who made the loan. Or the following case. A candidate for the position of burgomaster instructed an innkeeper before the election to treat all the inhabitants of the village with food and drink at the candidate's expense in order to influence the voters in his favor.

We can easily understand why it is that judicial practice has not in such cases at once declared itself in favor of the admissibility of the agreements made. And legislation too has taken account of this trait and considered the question as open while making a change in the expression of the First Draft of a Civil Code (1906). In place of the expression, "A legal transaction *whose content* is in violation of good morals," was chosen the present phrase, "*which* is in violation," etc. On the other hand, it will not do to invalidate a declaration of will because of some remote possibility that an unjust result may follow from the conclusion of the transaction; for it would follow that the sale of a piece of jewelry would be illegal because of the possibility that the buyer may present it to a courtesan.

The answer is given by thinking of the principles of just law and the types of their application. I mean more particularly to remind the reader that an unjust process in legal transactions may happen in two ways. One of the parties may misuse his partner in an illegitimate way, or *they may combine* to treat unjustly a third party (p. 223). And the last may constitute a violation of a duty of just law even if one of the parties merely gives the necessary *help* to hand over a stranger to the arbitrary treatment of the other.

Accordingly we shall have to say that a juristic act is from this point of view inadmissible in which two parties

combine in such a way *that the performance of the one in relation to the other helps essentially in the misuse of a third party, and has been promised with this purpose in view.*

It is clear that such help may be found also in securing by a present contract the fruits of a crime. For example, the thief pays for his purchase with money which the vendor knows to be stolen; or conversely, he sells the stolen object to a person who knows the facts (cf. also StGB. 370: 3); the acceptance knowingly of a gift coming from money criminally obtained (cf. D. XVIII 1, 34, 3; also J. III 26, 7). It will depend in all cases upon whether the promised performance appears as a forbidden swindle, abetment, or receiving of stolen goods, *i.e.* whether the latter are necessarily present in the promised performance. In that case the legal transaction having this purpose in view is inadmissible; not because it offers the *possibility* of an unjust purpose (for a great deal may yet intervene before such intended purpose is realized); but because the person concluding the arrangement *gives thereby essential help* for the unlawful (whether according to *just* or *lenient* law) misuse of a third party.

The same point of view holds true where a juristic act makes impossible the fulfilment of a legal obligation, which non-fulfilment imposes upon the obligor not a penalty, but (as mostly is the case to-day in breach of contract) an indemnity. Here also it may be that a juristic act having this aim in view is void; whether it is concluded between the person breaking his contract and a third party, or whether it takes place between two strangers who desire to induce one of the parties to violate his obligation. But in these cases also it is always presupposed that the new transaction aims at effecting the illegitimate result. Here is an example of an actual case. A person who sold a cow was persuaded by a third party to let him have the animal for a higher price, guaranteeing at the same time by contract to reimburse

him for any damages he might have to pay in case of an action on the part of the first buyer. The seller agreed to the arrangement; and having been obliged to pay damages to the disappointed buyer, he now brought an action against the possessor of the cow demanding the reimbursement agreed upon. The case was decided against the plaintiff recently in a district court in Hessen, and the judgment must be regarded as just. The second contract was "*contra ius*," as it aimed at the arbitrary violation of legal obligations. And it is the more certain because the third party by his interference made himself liable to the first buyer according to the specific provision of the Code in 826, as will be shown in detail in the following chapter.

To return now from these special considerations to the limits of freedom of contract, we must, in concluding our general remarks, still emphasize this difference. We must distinguish between a violation made by the transaction as a whole and one that resides in a particular part of the transaction. Certain specific results are necessarily connected with a transaction in itself permissible; for example, the liability of a contracting party for wilful non-fulfilment of his obligation ("*pactum ne dolus praestetur nullum est*," — BGB. 276); the liability of an assignee to the creditors of the assignor for the debts of the latter (BGB. 419, 3); the right of a partner or joint owner to give notice of the dissolution of a partnership or to demand a division (BGB. 723; 749); obligations imposed by law upon the industrial contractor or employer to safeguard the life, health, and morals of the employees (GO. 120; BGB. 619); and so on. In these cases an illegal clause is struck out and the transaction as a whole remains valid and produces legal results, which in default of specific determinations are determined by the transaction itself in accordance with the supplementary norms of the law. The same thing applies to

agreements providing for the separate living of husband and wife. Such agreements do not make the marriage void even if they were made at the time of the conclusion of the marriage contract. They are simply void in themselves. Nor do they become valid through the circumstance that the new Civil Code recognizes also the abrogation of matrimonial community in addition to divorce. For this also is possible only as a result of a judicial decree, not by a private contract, which would contradict the consequences following from the meaning of marriage (BGB. 1353).

Now this distinction between inadmissibility as a whole and necessary particular consequences is of interest in both kinds of limitation of freedom of contract, the limitation that is expressed in the technically formulated paragraphs of the law as well as that which is due to a violation of the principles of just law in general. The first offers no difficulty in practical application and may be omitted here. The second we shall take up when we undertake to systematize the juristic acts offending against "good morals."

Finally I must mention this. In our study we are concerned primarily with *juristic acts* (acts in the law). But it is a simple and necessary consequence that even where the law associates the origin of an exclusive right with the *free act* of a person, it must not, in accordance with its general principles, do this if the agent acts in violation of just law. This may be a violation of positive law in its specific technical expression (thus BGB. 958); but it may also be an act of conduct in violation of the duties of just law, as we shall present them in the next chapter. This is at bottom also the idea which the Supreme Court of the Empire had in mind in the decision mentioned above in which it refused to recognize the origin of a copyright obtained by an illegal act (p. 112). At present we confine our discussion to inadmissible *juristic acts*.

§ 2. *Transactions in violation of a legal prohibition.* — These may be divided into three classes. They belong in

essence to that method of the law by which it sets down and determines in advance what would be just on the average, at the same time directing the judge to observe it as being absolutely just. Technical elaboration can work out all manner of cases with fine detail. We shall only indicate the decisive point of view in each one of the groups and illustrate it with appropriate examples.

1. *Direct prohibition by law of certain juristic acts.* This is found in all parts of the civil law, especially in the present paragraph on usury, 138, 2. It extends the attempts of the earlier usury laws of 1880 and 1893 in the domain of civil law and supersedes them, while they remain in force as criminal laws (EG. 39; 47). According to this every transaction is now void by which a person takes advantage of the necessity, thoughtlessness, or inexperience of another to obtain for himself or a third party, in return for a consideration, any profits or a promise of the same, exceeding the value of the consideration to such a degree that under the circumstances the profits are out of all proportion to the consideration.

This determination therefore is one of the particular applications of BGB. 134, which deals with transactions "violating a legal prohibition." That it was given a place in BGB. 138 is really immaterial; and was only decided upon in the last stages of the discussions concerning the Code. And yet, despite the inner characterization, its combination with the first paragraph of 138 by the phrase "in particular" is not at all a mistake. The first paragraph says that the transaction must not be in violation of "good morals," *i.e.* in violation of *the principles of just law*. The additional determination of the second paragraph attempts to formulate a generally applicable rule for a certain average of experienced cases, as representing *just*, not *lenient* law. From this follows the practical consequence, first, that in applying the second paragraph of 138 we must consider merely the technical meaning of

this norm, and the paragraph must be kept distinct from any analyses that might be made of the first paragraph. And second, that it must be carried out in practice as co-ordinate with the first paragraph.

Here belong also the propositions dealing with contracts for impossible performances. It is not quite correct from the systematic point of view to place them, as has been done, in a third distinct group beside the other two, which deal with offences against the technically formulated principles and against the pure principles of just law. They denote simply a special application of the limitation of freedom of contract expressed in BGB. 134. They now embrace many things which were formerly expressed with precise detail; for example, contracts containing a disposition of "*res extra commercium*." There were many propositions in the provincial laws applying to these cases (ALR. I 4, 14; I 5, 85; — AG. to BGB. 89). Now they come under the principle of the original impossibility of a performance assured by contract.

If we go into the various details of our laws which have to do with BGB. 134, we find a great number of separate determinations which are otherwise unconnected with each other. Many dozens of them are gathered in indexes and dictionaries of modern law. We can refer here only to a very few propositions from different parts of the Civil Code.

An agreement made in advance that interest due shall again bear interest, is void (BGB. 248). Void are contracts about a future estate or the estate of a third person still living (BGB. 310; 312; — for the last cf. D. XXXIX 5, 29, 2, the consequence of which must not, however, be drawn for modern law). The same is true of an agreement made in advance by which in default of payment the ownership of the thing pledged shall fall to the pledgee (prohibition of the "*lex commissoria*" in pledge — BGB. 1229). Gratuitous renunciation on the

part of an illegitimate child, of the future support due to him, is void (BGB. 1714). A contract by which one obligates himself to execute or not to execute, to annul or not to annul, a disposition "causa mortis," is void (BGB. 2302).

Sometimes we find legal restrictions in specific transactions for special determinations, for example, a conveyance made conditionally or subject to stipulation as to time (BGB. 925); a real servitude without advantage for the use of the dominant tenement (BGB. 1019); a marriage contract with reference to a law no longer in force or a foreign law (BGB. 1433); a testament which leaves it to another to determine the subject or the object of the appointment (BGB. 2065). Of peculiar interest is the prohibition in betrothal contracts, of a penalty in case marriage does not follow (BGB. 1297; similar to D. XLV 1, 134 pr.; and opposed to ALR. II 1, 113).

In these legal prohibitions, from which we selected here a few examples only, and which have no further connection with each other so far as their specific subject-matter is concerned, experience teaches that private persons often express an inclination to evade them. If the law prohibits the mortgaging of movable property and allows only a right of pledge, the debtor often transfers his property to the creditor with the condition that it be transferred back again on payment of the debt; and in the meantime he leases the object of security. The Civil Code has not laid down any specific instructions for such evasive transactions ("in fraudem legis"). But they should be treated in the same way as the transactions to which the evaded law refers, and the quality of the evasive transaction will have to be admitted when the parties knowingly interpreted the law in too literal and narrow a manner.

2. *Prohibition of transactions by penal laws.* This concerns transactions aiming to produce an act that is threat-

ened with a penalty, and it declares them void. Such transactions may be,

(a) The promise of a performance to a person that he may commit a crime; whether directly by bribing or hiring the criminal, or indirectly by renouncing any claim for damages or guaranteeing him against penalty and costs (cf. D. XLVI 1, 73). On the other hand, a subsequent contract of reward is void only in so far as it contains an inducement to further crimes (cf. for this ALR. I 4, 146).

(b) A combination for the purpose of committing a criminal act in common. For example, contracts for smuggling; a partnership for the purpose of carrying on a forbidden lottery ("societas honestae et licitae rei esse debet"); a person took over from a licensed innkeeper the management of the business on his own account and responsibility, with the agreement, however, that he, the assignee, was not to obtain a personal license from the police, but should appear outwardly as the representative of the proprietor of the inn. This was a penal offence in violation of GO. 147: 1.

All these must be distinguished from cases where the transaction is in itself permissible, and yet one or both parties make themselves liable to a penalty by reason of the accompanying circumstances under which it is concluded; as for example a purchase in violation of Sunday rest; the sale of property under threat of execution with the purpose of evading the creditors (StGB. 288); transactions in violation of the Stock Exchange Act, 75-78. Here the transaction remains valid in civil law, for to be void it is necessary that the essential meaning of the contract itself shall be to produce an act forbidden by criminal law.

3. *Rejection of certain transactions by the law through fundamental emphasis upon certain statutes.* That this is covered by BGB. 134 and the corresponding norms of

our modern as well as foreign law, can scarcely admit of doubt. I shall leave it open whether the expression "against public order," proposed as an addition in the first sketch of the Civil Code (106), was intended to designate our present proposition; or whether that expression meant simply violation of fundamental public statutes (cf. also GVG. 173). But the expression is hopelessly vague and unclear generally. On the other hand, when CPO. 328:4 and EG. 30 introduce into our question "the purpose of a German law," they mean nothing else than is defined by BGB. 134, and we must now consider the inference that can be made from this introduction. For practical application has given rise to difficulties in this matter. We can safely mention as belonging here, contracts for divorce by agreeing to allege false facts. For in this case the fundamental idea of our law, that divorce should be allowed only on really valid grounds, is nullified by the arbitrary acts of the parties.

The validity of a betrothal while one of the parties is still living in a valid marriage has already been contested. But the illegitimacy of such a betrothal should never have been in doubt. A person can not at the same time devote himself sincerely and with a right mind to a perfectly undivided married life and prepare himself for a second of the same kind. If he is thinking of the latter, he has already actively broken the conjugal loyalty which he owes, and has brought a "contradictio in adjecto" into his conduct. Law can not approve this inner contradiction without introducing it into itself. Now it has actually happened that the party who was already married *appealed to the nullity* of a betrothal entered into under such circumstances; thinking that he would be able to evade the obligation of paying damages according to BGB. 1300. But this statute is really superfluous. All that may be attained by means of it is already assured by 825 in connection with 847, as well as by 826.

Doubts have also arisen in carrying out the Industrial Act; for example, in the so-called contracts for the receiving of beer in which innkeepers bind themselves to order beer from certain breweries only. Now GO. 10 prohibits only those trade rights which create incumbrances, and GO. 8 annuls all previously existing rights of monopoly, both of which are different from the contracts above mentioned. Accordingly it is not the contract for the purchase of beer as such that is against the prohibition of the law, but the agreement of its indissolubility.

Very interesting in this connection are the so-called hush moneys — promises made by one person to another that the latter may not report any prohibited act done by the former. Here we shall have to find in our law the fundamental proposition concerning crime that it must be reported and hence it is not permitted by law to have it bought off. The matter may be doubtful in case of offences prosecuted only at the request of the injured party. Here a distinction must be made. If the law leaves the right of initiative to the personal choice of the one entitled, he may by a contract come to terms privately with the defendant (possibly also by withdrawing the motion if such is possible). But if, on the other hand, it is a right that must be protected in the objective interest of another, as for example the right of initiative of the representative of a seduced girl (StGB. 182), then a contract by which the person entitled allows this right to be bought from him is surely against the intention of the law.

And this point of view can be always carried out with success; for the law must be handled with objective justice. Here are some examples: Payment given to the guardian that he may sell the payer the property of the ward; the representative of a professional society is given a reward that he may, in the interest of the party making the gift, recommend a given person for admission to the

association; payment made to a person that he should renounce his right to refuse to give testimony. Cf. for this KO. 188; 243.

Somewhat finer is the line marking off those questions having to do with the politics of the day. In Germany there arose well-known trials relating to the violation of Article 32 of the Constitution of the Empire, according to which the members of the Reichstag are not allowed to receive pay or indemnity. The Supreme Court of Austria had to give a decision concerning a contract by which a fee was promised to a politician for his activity as publicist and agitator in favor of the law governing the tax on brandy (which was soon issued in Austria). It declared the contract valid. Special interest attaches to a lawsuit undertaken not long ago in Rome by a journalist named Silvagni, the editor of the paper "Opinione." In Italy the papers, as a rule, can not exist without the support of political personalities and the government. Accordingly Silvagni tried to secure his paper financially by making a contract with the minister-president Saracco, who promised him a monthly contribution of two thousand lire if the paper "Opinione" supported the government and discontinued the attacks against the deputies di Rudini and Luzzatti. This payment having suddenly ceased after a few months without any reason, Silvagni brought an action against the minister-president for violation of contract. The verdict was against the plaintiff. The judge declared it was the duty of the press to serve the truth even in those cases where it has to criticize political personalities. If the manager of "Opinione" regarded the two statesmen above mentioned as blameworthy, he was not allowed to shirk this duty by receiving money. And if he did not regard them as blameworthy, he must abstain from attacking them even if he was not paid for it. Silvagni tried to procure for himself an illegitimate advantage in accepting a monthly fee for his

promise to spare the two statesmen; and his action is therefore to be rejected. We see that the decision must always consider whether a contract for a consideration endangers or even subverts and violates a right and a duty, which the law recognizes and intends that they be carried out objectively.

§ 3. *Transactions in violation of good morals.* — From the considerations so far adduced it is clear that many transactions which judicial administration hitherto has examined with a view to their agreement with "good morals," should as a matter of fact be classed under BGB. 134, and decided with reference to their violation of a "legal prohibition." It will be desirable here too to keep in mind very carefully the two distinct ways and means employed by legislation, namely, technically formulated rules, and judgment in accordance with the fundamental idea of law itself. There are, in particular, many cases, hitherto placed under the category last mentioned, which really pertain to the third formula of the last number, and must be decided in accordance with technically derived consequences of positive norms and regulations. Whether we should apply the one or the other mode of subsumption in our judgment, has its not unimportant practical consequences. In the one case we have as the highest norm a fixed and positive regulation, the meaning of which can be clearly made out and applied; and beyond it there is nothing further to consider. In the other case we must derive independently in each case the proper determination from the idea of just law with the help of the principles and the model. If a contract is opposed to a "legal prohibition," there is still an obligation to make good the negative interest of the contract * (BGB. 309). But if it violates "good morals," such a thing is out of the question.

[* Right to compensation under a void or avoided contract, where there was justifiable reliance upon it.]

If a legal transaction comes under the previous number, we must consider further whether it must really be regarded as void, or whether perhaps, according to the meaning of this positive law, another effect is to take place (BGB. 134). But if it is in violation of just law, there is only one result, namely, that the transaction is void. The distinction just emphasized becomes especially important when we consider the sphere controlled by the law, in reference to the object, the place and the time.

If a legal transaction is declared inadmissible by reason of a technical rule, the inadmissibility extends just as far as the objective sphere subject to the positive rule in question. A proposition of the Civil Code having this effect can not be applied to civil provincial law or to public law; whereas the result of theoretical legal science, and especially the method of its application in practice, to legal transactions in violation of "good morals," holds good also for questions arising in the other two spheres; unless, indeed, there is a special compulsory rule in force in the other legal sphere in question.

As regards international private law, the proposition is to be maintained that the question of the limits of freedom of contract must be decided by us and by our courts, first, in the spirit of our specifically formulated law, and then in accordance with the general principles of just law. A foreign law that is not in harmony with this must never be applied (EG. 30); and a foreign judgment offending against it must not be executed (CPO. 328:4; cf. 723). The following peculiar complication has also arisen, whether a transaction in violation of a foreign legal prohibition, which comes up for settlement in our land, shall be regarded as legitimate. Here is an example. A partnership was formed for the purpose of smuggling goods into Russia. A difference arose among the partners and their contract formed the subject of an action.

German law prohibits the business of smugglers who import dutiable commodities into the German Empire. On the other hand, to smuggle goods from Germany into a foreign country is prohibited only in those cases where there are national treaties (as between Prussia and Austria), and there is no such treaty at present with Russia. Now the question is, Was the partnership valid, and the "actio pro socio" admissible?

One may say that our law should not offer support to those who act against the laws of a State that is at peace with us. But the merely technical point of view is not sufficient. A society that desires to bring to a foreign nation Christianity and education against their laws is not considered illegitimate according to our law. We must therefore consider the matter from the objective point of view. And the result will be as follows: If our law determines authentically what, in its opinion, is *unjust* law, it indicates at the same time for those subject to our law and for our courts, that an act is unjust which affects a foreign nation by its results and offends against a foreign (technical) law in such a manner as we should call *unjust* when done against our own law. According to this the partnership above referred to would be for us void, and that too by inference from the spirit of *our positive* law. The further consideration whether the relations thus created are in themselves *right*, and whether it may not be that the State imposing customs duties is making unjustified demands, is according to this conception irrelevant and excluded.

The other question noted above refers to the *time* in which a legal transaction becomes inadmissible. Thus a doubt has been expressed whether after the law of usury of 1880, usurious transactions concluded previously can be prosecuted; also whether the renunciation of a claim that would come under the present determination of BGB. 138, 2 is to be regarded as void if it was made

after this determination went into effect. The question has also been properly asked whether BGB. 540 and 541 should be applied to old contracts of lease. These paragraphs provide that an agreement limiting or excluding the liability of the lessor for defects of the object of lease or for the existence of rights of a third party in the object is void if the lessor craftily concealed the defects when the agreement was concluded. The same question applies to BGB. 544, which provides that the lessee of a dwelling dangerous to health may give immediate notice of the termination of the lease even if he knew of the danger at the conclusion of the contract or had waived the enforcement of his right; and to BGB. 559, providing that the lien of the lessor does not extend to things which are not subject to attachment.

The proper decision is given by separating technically formulated law from the principles of just law. If a transaction offends against the latter, it is void under all circumstances, unless there is a specific law which determines by way of exception that those principles should not be observed. But as this has never been done either by the present civil law or by any previous law that has an interest for us; as on the contrary all legal systems that concern us here agree that transactions in violation of "good morals" are void, the most that can be said here is that we may need a *better knowledge* of the meaning of this precept. On the other hand if a declaration of will is in opposition to a specifically expressed compulsory law, then this specific attempt of the law to attain the right result in the average case must be taken and applied in technical fashion as it is. Such a legal proposition must therefore in every case be examined in order to make clear also whether it is intended or not to apply retrospectively to transactions concluded before it went into effect, transactions which at that time were in accordance with the positive law. A general presumption, such as that of

the negation of "retroactive force," can not be justified (cf. EG. 170). The meaning of every particular law must be made clear somewhere in one sense or the other (cf. BGB. 2171). It follows from this that it would be more correct to decide the question of the application of the law of usury of 1880, in its special order, to the transactions previously allowed by law, in the negative; whereas in reference to BGB. 138, 2 the reverse is true, if we consider the real intention of this technically defined determination. In this sense we must emphasize again and again that the two paragraphs of BGB. 138 must be taken together. In this way the second paragraph becomes as important and organic as the first. As regards the three questions above mentioned of the law of lease, the correct view is that the particular determinations of the Civil Code do not apply to old contracts of lease. For the changes effected by them in the older law have to do more with particulars, and hence there is no special reason why they should cause organic changes in the current contracts. They do not pretend to be more than particular details in a body of general regulations which (like the lien of the lessor) must otherwise be judged without doubt according to the older law. On the other hand, the prohibition of "locatio conductio perpetua" in BGB. 567 must be regarded as at once applicable to old contracts; for the contrary supposition, namely, the possibility of contracts of lease dating from ancient times and not subject to notice of termination, would make the purpose of the law illusory in a very considerable degree. But all this only serves to explain the difference between specifically formulated law and law that is just in principle. A more detailed explanation of this matter belongs to technical legal science.

We shall now undertake the systematic arrangement of those transactions that are inadmissible in principle. As was said at the beginning of this section, this is a work of

the lawyer and not of the moral teacher; though it is, to be sure, the problem of the *theoretical* lawyer. All efforts to penetrate this subject by means of the results of moral doctrines must be regarded as vain from the start. The two processes of thought are quite distinct. Each of these two — just law and ethical doctrine — has its own methodical problem. Starting from the same highest law of human volition, they must be worked out and carried through in detail by means of separate principles peculiar to each; and they find their unity only in the common problem of effecting a good social life of men. Here they support each other and become inseparable.

So far as I can see, Gruchot is the only one in recent legal literature who has the merit of having once made the attempt to systematize in objective legal fashion those acts in the law whose content is unjust. He names five classes of acts: 1. Contracts aiming to effect or promote prohibited acts; 2. A promise of a consideration for abstaining from a prohibited act or for fulfilling a compulsory obligation; 3. Contracts aiming to conceal a crime; 4. Contracts aiming to conceal the extra-matrimonial paternity of a man responsible for a woman's pregnancy; 5. Contracts by which influence is improperly exerted upon the freedom of resolution in matters in which a person should not allow himself to be determined by external motives. To this he adds by way of supplement, 6. Contracts in which compensation is promised for negotiating a marriage.

We see here that transactions in violation of a "legal prohibition" are not distinguished from transactions in violation of "good morals." But apart from this it is not at all clear what the unitary idea is upon which all the particular cases in the above list are based. The lawyer above mentioned does indeed say once, "Law would contradict its own innermost essence; it would cease to be *law* ('Recht') and change into *injustice*

('Unrecht') if it were at any time to deny the ethical principle forming its basis and lend its protection to immorality." But he failed to see that the "ethical principle" taken in its universal meaning can only denote the idea of just volition in general, and that he unconsciously used the term "immoral" in the sense of "not in accordance with law" in the matter of purposive activity. It is only this highest concept that embraces both divisions, namely, ethical doctrine aiming at pure intention, and just law concerned with good conduct. We have to do here with the consideration of the latter.

In taking up from the beginning the problem of systematizing those transactions which are inadmissible in principle, I ask the reader to recall the formulae of the principles of just law, and to bear in mind the method of applying those principles to the wide material of concrete cases by means of the conception of a separate community. In the process of working it out we meet with two possibilities. 1. The transaction is, on account of its violating the principles of just law, inadmissible as a whole, and 2. The opposition to the principles in question lies in a *particular determination* of the transaction, so that this specific clause becomes void.

Let us consider 1. Here we must apply the principles of *existence*, that of *respect* as well as of *participation*. Their common tendency is that the treatment of a person subject to the law must not be at the mercy of the arbitrary desires of another. This mistake may be made in the matter of respect as well as in that of participation. The obligor may be required to do a certain act, or he may be excluded from social life. By transgressing the limits set in this way we get inadmissible transactions providing for the *doing* of a thing as well as those providing for the *omission*. The technical division, on the other hand, of real and obligatory rights does not belong here. It is, in particular, immaterial whether a person

is excluded by the one or the other; for in our question of freedom of contract we are concerned with the inadmissibility of the legal effect in general, and the person in whose case the doubt arises stands always clearly and prominently before us.

We will now consider 2. In our discussion of "bona fide" performance we called attention to the fact that the determination of the Code in reference to "bona fide" performance is stringent and compulsory and can not be evaded by any declaration of the parties concerned. We can not conceive of adding to the proposition of BGB. 242, "Unless the parties have determined a performance in violation of 'good faith.'" Therefore every "lex contractus" which aims to impose upon the obligor an obligation to perform an act "contra bonam fidem," is as a particular element of the legal transaction in question inadmissible and to be stricken out. Now we must point out in a more general way that the same thing must be observed in reference to all other questions arising in the carrying out of legal relations. It follows therefore that a transaction aiming to bring about an unjust exercise of exclusive right (especially when the purpose is purely malicious), or "abuse" in family relations, or the exemption from "practicable" notification where it is required by law, or the creation of a determination that is clearly not in accord with "equity" — such a transaction oversteps the limits of freedom of contract and is in so far to be regarded as void. This follows strictly from the general norm of BGB. 138, 1. According to this, as we have established, no transaction may offend against the principles of just law. Granting even (according to the previous section) that legislation may here and there permit an unjust exercise of rights as such, — no one may appeal to a *juristic act* as the basis of such exercise. An exercise of a right which, according to the preceding discussion, is not admissible according to just law, can not

become legally effective, generally speaking, by an agreement in a definite transaction.

In this way we can also solve the recent difficulty, How far can those contracts of lease be properly contested which have been drawn up by the associations of house-owners in agreement? They remove to a great extent the supplementary and impersonal determinations of the Code, and put in their place others more favorable to the lessors. It has been thought that this is against "good morals" if it happens "systematically." But the major premise is here somewhat obscure. And the deduction is in any case not conclusive because the law itself laid down the determination of contract before it added the merely *supplementary* rules. Consequently it can only be a question of the limits of freedom of contract which are given by BGB. 242 on the general basis of 138, 1. As soon as, in a specific case, there is a regulation in a contract obliging the lessee to carry out his lease in violation of "good faith", such a determination of the juristic act in question must be stricken out as void.

Now when a part of the juristic act thus becomes void, the question arises again whether the part unaffected can remain in force as a whole. The Civil Code has attempted to settle this in a general way in 139, as follows: "If a part of a transaction is void, the whole transaction is void unless we may *assume* that it would have been entered into without the part which is void." But how are we to determine whether the validity of the entire transaction is to be "assumed" or not? This surely can not be answered simply by reference to the *private will*. For the entire question turns about its admissibility and necessary limitation. We can not throw out one part of the transaction by reason of its opposition to "good morals" and keep the other intact *simply and for no other reason* than because its content was desired by the persons involved. It follows therefore that the remaining

part of the transaction, after the rejection of the objectionable clause, must again be subjected to the test, whether in its abridged form, as it now stands, it is within the limits of the freedom of contract? The tables may have been so turned by the erasure that the remaining part imposes an inadmissible pressure upon that party against whom there was the former grievance according to the principles of just law, caused by the clause that was struck out.

If we combine what we said above with the divisions arising from the *Types of Performance*, we have the following scheme:

Transactions in violation of "good morals"		
with one's own person; with persons belonging to one; with one's prop- erty;	as a whole	in particular determinations for acts
	of doing	of omission
	exploiting each other	combination for the purpose of misusing a third party

§ 4. *Inadmissible transactions positive (misfeasance).*

1. *Giving up one's own person to the arbitrary desires and demands of the other.* Here we simply apply the principles of *respect*. And we must remind the reader that arbitrary treatment, in the sense of merely personal desire, takes place when a person demands *whatever he wishes, and because he wishes it*. It might seem at first sight as if here also the legal effect goes back to the will of the obligor. But as a matter of fact he has renounced all limits of his own setting so far as the *content* of his acts is concerned. His volition is merged in the mightier will of his opponent, having put itself at his entire disposition without maintaining itself in principle in this performance. The thought of a separate community is missing, in which each respects the other also as an end in himself. Urging

his desire in a merely personal way, he sees in the other party a mere object for him, a mere means for his use. The very thing he would *not* wish for himself in a similar case, namely, to be treated like a thing, he imposes upon his partner in conduct and performance. In a naïve and thoughtless way the contradiction is overlooked, which is so important here from a topical point of view. But the law can not tolerate such contradiction in itself. And thus arise in the practice of legislation and judicial administration the conflicts experienced so often.

These have been considered especially in connection with slavery and parallel relations of ownership, from the days when Joseph bought the persons of the Egyptians for Pharaoh (Gen. 47, 19) to the last action concerning slavery in German territory, which took place in Berlin in 1854 before the municipal court. The difficulties were appreciated especially in the well-known sayings of the Greek philosophers and the Roman lawyers on slavery. The question came up again recently in connection with the emigration of Italian laborers to America; with the contracts of the British East African Society for the importation of Bechuanas; also in the Reichstag (March 11, 1899) in connection with the emigration of young servant girls to the protectorates (cf. also p. 206).

It is immaterial in what form one obtains unlimited power of disposition over the person of another. When Kathinka Balmy in 1812 wrote to Prince Hardenberg asking him to be allowed to raffle herself and her fortune of 60,000 thalers in the Berlin lottery in favor of an invalid who had taken part in the wars of freedom, there was no legal possibility of realizing her request.

Modern lawyers have often discussed the bond of Shylock in the "Merchant of Venice." There is no doubt from the point of view here presented that the agreement in the play is for our law void. For the rest it is not necessary for us to decide here whether the legal anecdote

actually represents a historical development of the law from execution against the person to execution against property, or whether it is merely a harmless exercise of wit showing in a formal and pointed manner the discomfiture of the villain.

It is clear at once that transactions for corporal mistreatment and chastisement belong here, and are void. When Hebel tells of the agreement before the notary, by which the military officer promised the tradesman a horse in exchange for five blows with his cane, of which he then gave only four, the objective decision is not difficult. Occasionally in the discussion of the extent to which associations may punish their members, reference has been made to the mention of corporal punishment in the rules of associations. But this is altogether inadmissible so far as the punishment itself is concerned; nor can a penalty based thereon be recovered.

In getting drunk to the verge of insensibility and in other vices there is a renunciation of human dignity; an improper use of the products of social labor; a false mode of appearing in society. One may think that to abuse oneself as, for example, by immoderate drinking, is the individual's own affair, and does not concern anybody else. But the "individual" would not exist without the community. From the community he has received what he is and can do. He owes the community his being, his *true* being. Therefore contracts for the temporary stupefaction or disabling of the powers of the senses or the understanding by immoderate drinking are opposed to the idea of right communal living and its principles. A contractual penalty for the non-observance of drinking customs is, under the conditions above described, void. And the sale of alcohol to drunken persons must also be void. For the innkeeper who plies the intoxicated person with more drink, promises thereby a performance which can appear only as an aid in misusing the person of another.

The "contractus cum meretrice initus" belongs here especially. In miscellaneous sexual surrender a human being becomes a thing, a mere means for the personal desire of another. It follows therefore at once that all contracts for pandering must be likewise declared void. Difficulties may arise in connection with contracts of sale or lease of brothels. As was said before, it depends upon whether the object of the contract is a house that is especially suitable for immoral purposes; so that the price of the sale or lease is determined with reference to the business intended to be carried on therein. But the mere possibility that the person acquiring the property will misuse it is not sufficient to make the transaction void (p. 306).

An East Prussian court had to decide a case in which a girl demanded a promised sum of money as compensation by contract for a *kiss*. A general decision in a mechanical way is impossible. The "kiss of honor" is something quite different from an article of exchange. And if the agreement aims at the latter, we can not get away from the objection arising from the fact that it puts the body, and therefore also the unsharable personality of a human being at the disposition of another. And it may also be that an obligation to kiss a person may for the giver be unpleasant and inadmissible, as Tillier shows in "Uncle Benjamin."

Similarly in the case of a contract made with a nurse; if she can accept a strange child without sacrificing her own, the validity of the contract can not be objected to. In the opposite case it can. And if this condition of necessity is shown during her service as nurse, the latter may be terminated on "valid grounds."

The question of the validity of contracts of service in the execution of which there is danger to the life of the workman, may also be decided with certainty by making use of the *idea of community*. When people work and struggle in common in such a way that every one is

regarded and treated by every other as a member of the community and as an end in himself, then the dangerous character of a given work in common is no argument against the validity of a special association having such aim. We think at once of sailors, miners, Alpine guides, in undertakings of real importance which do not serve mere personal humor. It is difficult to imagine concrete social relations in which it would be justified to have mercenary troops as the only form of protection of our external peace. As for contracts in certain prize-fights where, as in the bullfights of Southern countries, human lives are exposed to danger of destruction from the mere desire of personal pleasure, they can not be justified at all (Cf. GO. 124: 5).

A matter that is still undecided is the right treatment of a dead body and the manner of disposition of his own body after death on the part of the living person (such as selling it for anatomical purposes), and on the part of the survivors. Modestinus tells of a testament in which a person was instituted heir on the condition that he would throw the ashes of the testator into the sea. His decision is that the person instituted as heir need not do this, and that he retains the inheritance if the testator was of sound mind when he drew up the last will (D. XXVIII 7, 27 pr.). We must also assume as a fundamental principle that the corporeal remains of a deceased person are not a matter of business transaction (cf. also StGB. 168; 367:1). But we must also admit that the matter becomes different where cadavers and parts of cadavers are used for objective purposes, namely to advance our knowledge and power.

Under the head of surrendering one's person illegitimately to the arbitrary desire of another would come also contracts for the change of one's religion; or for remaining a priest, and similar cases. It is properly said in this connection (ALR. I 4, 9) that "freedom of con-

science can not be restricted by any declaration of will." This is, however, not violated in practice when the eligibility to succession to a fief is made conditional on being a member of a definite confession.

2. *Performance with persons entrusted by law to the person promising.* Here belong in the first place contracts for the education of children. Such contracts concluded between the parents can not be regarded as void without good reason. For they oppose the principles of just law only when they prove to have been entered into in the personal interest of the parent or guardian instead of being measures for the interest of the child. Therefore the supreme court of judicature has properly decided, in accordance with BGB. 1635, that the following agreement between husband and wife, while action for divorce is pending, is valid, namely that the son of the parties shall be brought up solely by the mother, and that she shall renounce all claim of support against her husband. In observing the practice hitherto widely prevalent in this question, we must remark that the competency of the trial court is different from that of the orphans' court. The validity of a contract concluded between the parents for the bringing up of the children is decided by the first. The interference of the second follows BGB. 1666.

So far as concerns the religious education of the child, provincial law must be followed (EG. 134). And according to that law deviation by contract from the legal prescriptions there in force are for the most part prohibited (so ALR. II 2, 77). The betrothal of two children by their parents, Paulus rightly declared invalid (D. XLV 1, 134 pr.).

Contracts by which parents hand over their children to third persons present a different aspect. Here they become void the moment they introduce the element of surrender to the arbitrary desires of the third person.

This may vary in a number of ways. The Prussian supreme court of justice had to enter judgment in a case where a father claimed a thousand thalers, which was promised to him as compensation for the complete surrender of his three-year-old daughter to the defendant. The court decided that outside of adoption such surrender is legally inadmissible. The Supreme Court of the Empire was recently occupied with a case in which a six-year-old child that had been given over by its parents to a troupe of acrobats for training, was transferred by them to another company and by the latter to a third, the leader of which abused the child. When the latter was charged with ill-treatment of the child, he argued that he had struck the child in the exercise of his parental right of chastisement which had been transferred to him, and hence could not be punished. The Supreme Court, on the other hand, assumed that such complete renunciation of a child was a violation of "good morals," and therefore void. Hence there could be no valid transference of the right of chastisement in such a transaction. This objection could therefore, it was claimed, not bring about the acquittal of the defendant. An action for damages is said to have been brought before a court in Warsaw under the following circumstances. A son was born to a peasant, having six fingers on each hand and six toes on each foot. He assigned the child to a manager, who was to fetch him after two years in return for the compensation agreed upon. But when he came, he found that the mother had in the meantime had the extra fingers and toes cut off.

If, however, the contract provides for a partial surrender of children for the purpose of their education, or if it is a contract for work, then, according to the point of view repeated above, it is valid. This would be the case even in the leasing that was practiced in the celebrated child market at Ravensburg (cf. D. XXXVIII 1, 25).

3. *Exploitation of the property of another.* In legal experience there are in general three kinds of cases that belong here. (a) Usurious exploitation, so far as it is not already covered by the second paragraph of BGB. 138, which, as was said before, must be regarded as a "legal prohibition" in the sense of BGB. 134. (b) The complete surrender of one's property rights to the free uses of another; whether as a result of a contract or a unilateral transaction. (c) Transactions providing for compensation in return for the fulfilment of one's obligations.

(a) It was disputed whether there was such a thing as illegitimate usury even before the law of usury of May 24, 1880. In other words, the question was whether a transaction providing for usurious exploitation is void without reference to any positive particular ruling, on the ground that it is covered by the prohibition of "*negotia contra bonos mores*" (cf. p. 111). This question must be answered without doubt in the affirmative where, as a result of the exploitation of another, a person's property is placed in such a position that he is nothing more than an instrument in the service and the profits of the other person. But a case like this does not happen very frequently. But it is possible that the particular transaction in question is in itself of a usurious nature. This is the case if in his specific situation the promisor is treated as an unfree means at the arbitrary disposition of the other. The formula of our laws, which speaks of "exploiting" a certain situation of the other party, is quite correct. But as can be easily seen, difficulties arose in the practical application when it was necessary to give a numerical estimation in each case. It was tried sometimes to fix this by law; thus in "*laesio enormis*" of Diocletian (see, on the other hand, his discussion of a case that came up before him, in C. IV 44, 8), as well as in the legal limitations of the rate of interest. The modern usury laws, as

is well known, have introduced *proportional* valuation; where we have to operate with the common value of exchange (p. 227). And this would have been the right thing also for the time previous to these laws.

Nowadays, on account of the comprehensive formula BGB. 138, *second paragraph*, there are only a few transactions that are void because of usurious exploitation in violation of "good morals" (BGB. 138, *first paragraph*). This might be the case in gifts made as a reward to the donee. The following transactions also in many concrete situations may belong here: Breweries make loans to poor innkeepers in order to acquire the ownership of an inn where their beer is sold. The loan is more than five times as much as the expected annual sale, and the borrower becomes wholly dependent upon the lender, who treats him absolutely as he pleases.

The question may offer difficulty in the case of a businessman who sells at a sacrifice in order to underbid and ruin his competitor. None of the three qualities of 138, 2 is found in this case. But it is true at the same time that he can not appeal to the principles if he subsequently refuses to deliver the goods sold at low prices, because he did not realize the end desired. For there must always be *exploitation* if the transaction is to be void. If the creditor knows nothing of the specific situation which makes the transaction usurious, the person promising is not at all subject to the arbitrary desire of the other party so far as the transaction is concerned. It is therefore a question of carrying out a valid transaction, and particularly of regard for the principle that the obligor must perform his service as "good faith" requires.

(b) If the obligation of the one party is left completely undetermined and subject to his free judgment, the opponent is placed entirely in his power. If therefore a transaction is intended to establish a specific association for some common purpose, but as a matter of fact one of

the partners is surrendered as a mere means to the other, the transaction is in so far forth self-contradictory, in violation of the principles of respect, and hence void. In connection with the doctrine of undetermined performance we may call attention to the illegitimate regulations inserted in labor contracts (cf. GO. 134 a-h; 148 : 1, 11), concerning the imposition of penalties; for example, arbitrary penalties according to the personal judgment of the employer or of certain functionaries; arbitrary disposition by these men of the moneys collected from fines; and other similar cases. The modern business of the theatre has also given rise to such transactions; providing for penalties or containing stipulations that in case of litigation the director may withhold the salaries due his employees without default interest for outlays and delayed performance, or during the pendency of the action until the judgment has become conclusive. The following case was doubtful, where an actor renounced in advance the profits of his benefit performance in favor of the director. This may be an exploitation in the entire extent of the performance; or it may be a gift; or it may be a specific performance for a consideration of another kind. In the latter case the contract, it seems to me, is not subject to avoidance.

(c) In Ulpian's commentary on the edicts is found the statement, "Si ob maleficium ne fiat promissum sit, nulla est obligatio ex hac conventionem" (D. II 14, 7, 3). Modern systems of law have not formulated such a proposition specifically (cf., however, Bavarian Draft Code of 1861, Art. 56); nor has the Civil Code of the German Empire. But the norm must be recognized as just. It is usually justified by appealing to the "moral law." It is also said that it betrays a "low character" to stipulate a price for performing one's obligation. But this is misleading. The contract in question is opposed to the principles of *just law*.

Here a distinction can be made between promising compensation in a contract for the fulfilment of obligations of technically formulated law and those of the principles of just law. In the first class the law would say, You are obliged to do thus and so, but you may demand to be paid for it. This would be the same as saying, You need do it only if you are paid; it is therefore a matter of your own choice whether you intend to do your main duty or not. Thus by recognizing the new contract — of compensation for the fulfilment of a legal obligation — a contradiction is introduced into the essence of the law's command. Recognition of the contract would therefore be opposed to *just law*, or to use the traditional expression, opposed to "good morals."

One might doubt whether we can prove with the same apodictic rigor that a similar contradiction would result in case of a contract for compensation for the fulfilment of obligations of just law. A doubt may arise here because the positive law in its specific expression does not always command obedience to just law. Nevertheless we must decide here as we did in the first case. For *just law* must also claim obedience for itself, in the sense that from its point of view it does not depend upon a person's choice whether he wants to be obliged or not. To use "*si voluerim*" in connection with a legal obligation is just as contradictory here as it was before. Now it is true that positive law does not simply say, You must always fulfil the obligations of just law; but it says, Your obligation resulting from legal transactions must not be opposed to just law. But it would be opposed to it if a person could let another bind himself by law to promise him compensation for fulfilling just law; because by recognizing such an obligation we in reality regard the command of just law as dependent upon a person's choice.

§ 5. *Inadmissible transactions negative (non-feasance).*—Here a person renounces his right to make use of something that is legally permitted; and it is done moreover in such a way that the decision is made by the personal choice of one of the parties. In these cases the most frequent occurrence in practice is that, as was mentioned before, several persons combine to bring another into the situation described. The arrangement of the material can be divided into three classes in a manner parallel to the previous section.

1. *Legal transactions restricting one's personality.* Here we are concerned especially with a person's renunciation of his *legal competency*. This has often been attempted in cases where a person has shown himself unfit properly to manage his property and there is no ground for a judicial declaration of incompetence, or where his relatives are unwilling to make use of it. If this person puts himself by a private contract under the guardianship of another, it cannot have a legal effect to lessen his legal competency.

In the discussions on the Civil Code in the Reichstag it was recognized by various persons that contracts against the freedom of association are opposed to the present determination of BGB. 138, 1, and are void. The view is correct. It makes no difference whether the associations in question are political or religious or industrial. The right of association with others for such purposes is, as has been rightly emphasized, in our situation a result which follows from the right of personal activity generally. And though this is not expressed in the law in so many words (cf. GO. 152; 153), it is so certainly implied in the fundamental character of our present social economy that a legal transaction excluding it must be regarded from the point of view here emphasized as void.

In a contract of lease the lessor, an enthusiast of the science of healing by natural remedies, stipulated that the

lessee should never call a regular physician, on penalty of immediate notice to terminate the lease. As we cite this incident in the present connection, it is clear from our point of view that this agreement is void. Take another case of a person who joined a temperance association which prescribed a penalty for excessive use of alcohol. Here there is not the element of permitting another the arbitrary control of one's person. It is simply a question of a member of an association taking upon himself a limited obligation in the interest of a *right* social life.

We find frequently contracts concerning the place of residence of the other, for example between the son-in-law and his wife's parents in the interest of the latter. Between husband and wife it is regulated by law (BGB. 1354). But even apart from this a legal transaction with that purpose in view is according to the principles inadmissible (thus already in D. XXXV 1, 71, 2).

In general one can not by a legal transaction effectually renounce the right of going to law. In recent labor agreements occurs the statement that "in all matters of dispute the personal judgment of the master is decisive, and judicial decision is excluded." And similar determinations are found in the rules of associations in favor of the ruling body. But the renunciation is, according to the views here presented, certainly void. The case is different where litigation is regularly replaced by providing for a court of arbitration.

In many family laws of the high nobility is contained the provision that only one male child may marry. There is no doubt that in private transactions this would be an inadmissible restriction of personality (see also ALR. I 4, 10-12). That the rule in question was and is (EG. 58) a product of autonomy does not change the matter. Just as foreign law must not oppose the general demand of "good morals," so neither can any other family law in force do this successfully.

In a specific case a bridegroom learned that his bride was pregnant by another man. Wishing to annul the betrothal, he was promised a sum of money by a third person that he should not annul it. This was followed by a conclusion of marriage. The court justly decided that it was a "*negotium turpe*." It was a case of renouncing the right of withdrawal justified by law, in the carrying out of which the person renouncing necessarily had to allow himself to be sacrificed. In so far as this posited an obligation to conclude the marriage, it was a violation of the first principle of *respect*; and as excluding the right of withdrawal, it offended also against the principle of *participation*.

2. *Legal transactions to omit one's care for persons entrusted to one.* This is in most cases determined strictly by technically formulated law. Among the Romans the question still came up whether a "*pater familias*" can bind himself by a valid contract to give up his "*potestas*" by "*emancipatio*." Javolenus answers the question in the affirmative (D. XLV 1, 107). By the abolition of the last named institution in modern law, the question is for us settled. In the history of law we may recall the rule that renunciation of the right of manumission of a slave is void (C. IV 57, 5; cf. D. XL 5, 40, 1).

In the next chapter we will present in detail the duties of *just law*. The Code often designates them as "*moral duties*," and recognizes them accordingly as imperfect legal obligations. So far therefore as we can enumerate such duties, a legal transaction for their omission would not correspond to just law. This has general significance; but may be placed here because this violation of "*good morals*" is likely to happen in most cases through the exclusion of relatives, whose care the law particularly prescribes, though only in an imperfect manner (cf. D. XXVIII 7, 9).

3. *Omission to exercise one's property rights in deference to the desires of others.* Here we are dealing with a legal

transaction by the terms of which the obligor declares, "If you, the other party, so desire, if it is your personal pleasure, I will exclude myself from social co-operation"; or it may be thus, "We will see to it that third persons shall, by our free choice, be thus excluded."

This point of view is directly applicable to our present study according to our method. We must bear it constantly in mind and apply it in detail throughout the discussion. I will therefore conclude this section by citing the illuminating material of special cases without repeating exhaustively in each case the decision and its justification.

In Hommel's "*Rhapsodia quaestionum in foro quotidie obvenientium nec tamen legibus decisarum*" (1776) the following story is told. "In via duo licitatores forte conveniunt, eodem animo expositum hastae fundi emendi, et heus tu! unus alteri: quantum licitatus es! mille, respondit thaleros. Tunc ille: apage, ego tria millia dabo. Sed quoniam amici sumus, desiste quaeso! dabo, ni gravis sis, ne superando et licitando me urgeas, tibi aureos quinque. Acceptato promisso is ergo desistit. — Sunt, qui dicunt, initum inter utrosque pactum turpe esse, et subhastationem quidem subsistere, sed curator bonorum actionem ad id, quod interest, dari contra seductorem. Aliis tamen visum, hoc initum inter utrumque licitatorem pactum esse licitum et fraudem honestam, de qua curator bonorum conqueri non possit." This difference of opinion does not exist, as is well known, any longer. The Prussian law of July 14, 1797 prohibited "*pacta de non licitando*." The Code Pénal of 1810 (412) and the Prussian Criminal Code of 1851 (270) impose a penalty. Our Code is silent. The prevailing opinion is (and it is justified, too) that the previous determinations of private law are abolished by it (EG. 55), while those of the criminal law are still in force. In the provincial laws of the latter the question is settled by a "legal prohibition." In the rest it depends upon whether the given case contains an abuse of the kind

above described or not, whether it be between those concluding the contract or, as is more likely, on the part of the one who made a public bid.

A particular case belonging here is the celebrated *competition clause* (contract in restraint of trade), an agreement whereby a competitor, under penalty of a fine, undertakes to give up his business. This question has long given rise to difficulties. The new Commercial Code (74) desired at least to make one specially important case free from doubt. It determined that an agreement between a principal and his commercial clerk about to leave his employ, by which the latter is restrained in his commercial activity for a certain length of time after severance of relations with his employer, is binding upon the clerk only so far as the restriction in time, place, and subject-matter does not entail undue hardship upon the clerk in his advancement. Moreover, the restriction must not extend beyond a period of three years after the termination of the service. We see here an expression of the idea stated above with precision, that we must avoid giving a person arbitrary and unlimited power of disposition over another. But it covers only the one case of a commercial clerk. And here too it leaves certain details undecided by covering them with the formula that we must avoid making it *unduly* difficult for the clerk to advance himself. To decide these as well as the other cases of competition clauses, which are not at all covered here, we must follow the method above indicated.

Thus a contract by which one physician promises another in return for a sum of money to give up practising in a given district, has been justly regarded as valid. For this was regarded as a very limited obligation in which there is no surrender to the arbitrary volition of the other party. An agreement is also valid by which businessmen, especially the members of two united enterprises, mutually bind themselves not to carry on the same business in a

definite circle, in which the united enterprise is to be established. Two manufacturers agreed, on penalty of a fine, that neither may sell cement to the customers of the other without the latter's consent. The court regarded this agreement as invalid because the obligation was intended to remain in force after the termination of all contractual relations between the parties without a time limit. This is correct, and can be justified by the principle above stated (p. 341). A locksmith was initiated by the heads of a concern in the secret of manufacturing imitation amber after binding himself by a written declaration never in any manner or form to imitate this process within thirty years, or to reveal to others the secret of manufacture. This too was valid; for the person making the promise remains free in his social-economic activity as a whole, and it was of his own free will that he took upon himself the obligation of respecting the purpose of the others; so that he would be the man guilty of arbitrary dealing if he broke his pledge.

It has been debated whether a person can secure himself in advance by a competition clause, when at the time of concluding the agreement he is not yet engaged in any business against which competition may arise. It was brought erroneously by a judicial decision under the prohibition of BGB. 226. For it is not at all a question of the right *exercise* of an existing right, but of the *origin* of a valid relation of obligation. And this doubt can be solved in every case only by the point of view emphasized above. It is true, however, that an arbitrary and invalid obligation is more likely to take place under the circumstances named.

An obligation not to engage in a certain industry can very well be justified in general on other grounds than the fear of injurious competition; as for example in the case of obligatory contracts which schools, churches, hospitals and other similar institutions conclude with their

neighbors restraining the latter from engaging in "noisy trades"; or the prohibition of opening an inn imposed by contract upon the buyer of a dwelling house, or in a particular case where a stenographer bound himself for the consideration of a sum of money from the condemned person to refrain from publishing the stenographic account of the trial which he had taken.

This leads to such cases as the following, in which the creditor out of hostility to third persons exacts a promise from the debtor not to do business with that third party. In the usufructuary lease of a farm the lessee had to bind himself not to have his wheat ground in the village mill, because the lessor was on bad terms with the miller. Two factories made an agreement that in case of a strike in one of them the other should close its doors also. And above all *boycotting* belongs here. The boycott may consist in abusing one of the contracting parties or in an agreement to injure a third person. The management of a large mill had disciplined a number of employees, whereupon the party to which those men belonged declared a boycott against the mill. They collected the signatures of ninety master bakers in the city, who bound themselves on penalty of a fine not to buy flour from that mill. A number of bakers subsequently changed their minds and "withdrew their signatures," upon which an action was brought against them for payment of the fine. Here we are clearly confronted with the picture of the monkey using the cat's paws to pull its chestnuts out of the fire. As a rule, however, it is a third party who is ill treated by a boycott. The purpose of the combination against him is to exclude him from social co-operation by the arbitrary will of the boycotters, and to grant him this privilege only on condition of his yielding to their personal demands. The agreement of the boycott is therefore opposed to the principles of just law and is not valid or effective for any of the parties involved.

Finally we are interested here in cartels, rings, syndicates, trusts. These are associations for the purpose of opposing the anarchy of production and sale in the sphere of their activity. In the specific aims which they follow they use the means of free contributions to bring about centralized management. As the latter is often a very appropriate means of just law and can sometimes scarcely be dispensed with, so it is possible that the monopolizing cartels may under certain circumstances offer a practicable way for good co-operation. They can lend protection and defence to the individual who, under conditions of unrestrained freedom, would not be able to realize his proper activity in the social economy; and they can effectually put a stop to the exploitation of the weaker party by making it possible for him to combine with others. All the reasons which speak against letting things go on the basis of mere individual interest; all the factors which make the idea of community life precarious if we base it merely upon the personal aims of individuals — all these can be cited in support of a defensive combination of those working in the same field. For “atomization” is opposed to the very aim of social life, which is to strive and struggle *in common*; and “individualism” is dangerous, or at least it is hard to understand, when one lives in a *community* according to its own highest law.

But on the other hand, cartels and rings are again merely the results of private resolution. They are combinations for personal ends. And in so far they are exposed to the danger of becoming the means of abuse, whether of those combined in them or of the consumer, from whom the goods are kept by the personal and arbitrary will of these trusts. This has often caused the legislators pain.

The attempts made by the Roman law against monopolies and cartels seem to have received little notice. Ulpian speaks of decrees of the emperors against usurious

dealers who buy up the grain and let it lie, until a failure occurs in the crops, when they raise the prices as high as possible (D. XLVII 11, 6 pr.). And the Code cites a number of detailed constitutions against combinations of the kind here mentioned (cf. C. IV 59, "De monopoliis et de conventu negotiatorum illicito vel artificum ergo-laborumque nec non balneatorum prohibitis illicitisque pactionibus"). To be sure, there is nothing there that can be of use in our judicial administration. In the latter every question must be examined by itself according to the principles of *participation*. A particular member of a ring must not enter into an obligation in the carrying out of which he is excluded from exerting his own activity in economic life and is sacrificed to the decision of others. He must find it possible always to follow his own purposes in an objective manner and not to accept the decision therefor from one or more others according to their arbitrary determination. The court must examine how far, on the ground of mutual responsibility, objective volition is possible for both sides, or whether the obligation contains a necessary abuse of the one party in the interest of the merely personal endeavors of the other. For in so far as the latter is the case one of the parties is excluded from social activity by the arbitrary judgment of the other; and hence the contract having this aim — as being a separate will in opposition to the idea of just law — is void.

But it is also possible that third persons in legal combination may be excluded by the joint owners of a cartel. And in that case also and for the same reason a contract has to be regarded as void which instead of aiming to be a means for just co-operation endeavors to exploit the other members of the community by the arbitrary demands of the members of the ring.

One's *idea of community* must be very weak if he has any doubts in the matter. And yet every assumption not

in harmony with this idea is contradictory. The individual in himself, taken merely as such, is for *social* consideration nothing at all. He has not merely taken everything he has from the community, but is still continuing to take it. And the same Rockefeller who strove to get the petroleum business in his own hands and to treat all the consumers according to his personal demands — this same person could form this plan only by calling upon the protection of those very people whom he desired to abuse for his personal pleasure. For as an individual — with his two fists — he does not count at all. It is in the capacity of a member of the community that he is to be considered. Without the community and its approbation he would have had no property and no contractual rights — both of which he now wishes to use, in merely subjective fashion, to the disadvantage of the community. If every one were to do this, there would be no community possible and no rights for it to grant. *It is clear therefore that he calls upon the community, and at the same time refuses to conduct himself as the idea of the community demands.*

CHAPTER THREE

DUTIES OF JUST LAW

§ 1. Dotations corresponding to a "moral duty." § 2. Consideration for "propriety." § 3. Indemnity as a matter of "fairness." § 4. Deliberate injury in violation of "good morals." § 5. Accepting a performance in violation of "good morals."

§ 1. *Dotations corresponding to a moral duty.* — In the first chapter of this Part we treated of the right exercise of legal relations originating from positive law. Now we extend the discussion to right conduct of men generally. As we are thus abstracting now from specific legal relations on the basis of definite legal facts, our question now is, What sort of obligations are incumbent upon every one of us — to what kind of doing and omission are men justly bound, apart from any compulsion exercised by a particular expression of the law?

"Non omne quod licet honestum est" (D. L 17, 144 pr.). In the question just stated the distinction is clearly and forcibly expressed between a technically formulated law and a norm whose content is just in principle. It is here especially that a distinction is expressed by linguistic terminology as well as by prevalent opinion between *statute law* and *ethical doctrine*. The Code also apparently follows this opinion where it makes reference to those duties, justified in principle, which we intend to discuss here. It speaks in those cases of "moral duty." We have already said before, however (p. 48), that this can not mean duties of *ethical doctrine* in the strict sense of the word. "Moral duty" in the meaning of the Civil Code signifies *the observance of the principles of just law*.

In the first place, then, it is a "moral duty," using the expression in its traditional meaning, to carry out legal

relations justly. All we need do in this connection is to recall the results of the first chapter. There is then the further question of determining the *independent* duties of just law. We must therefore use for this purpose the principles of the *existence* of legal relations. But as these are twofold, appearing among the principles of *respect* as well as of *participation*, "moral duty," in the present application of the expression, embraces:

1. *The duty of performance in behalf of him who would otherwise be the object of the arbitrary will of another.*

2. *The duty of performance in behalf of him who would otherwise be exposed alone to the struggle for existence.*

But there is no general proposition either in the civil law of the past or of the present deciding that every one owes obedience legally to the requirements of just law, *i.e.* that every one is legally bound to fulfil the "moral duties" in the sense we have now given it, namely as equivalent to *just conduct*. And not only is it true that positive law avoids such general reference to just legal principles, but it has chosen instead a definite technical expression for a particular allusion to them. The reader of the Code will find two such instances of limited reference. These two cases do not *require* the fulfilment of a "moral duty," but merely *approve* a dotation in accord with it. More particularly positive law has determined that in the voluntary fulfilment of such duties, "*condictio indebiti*" is excluded; and secondly that *gifts* made in accordance with such "moral duty" are not subject to reclamation or revocation, and can be made also by one who administers and uses the property of another, or is otherwise responsible for the management of an estate. Accordingly we divide the following into two classes — performances and gifts.

Performances responding to a "moral duty" (BGB. 814). This raises in general the "*vinculum aequitatis*" (D. XLVI 3, 95, 4), which represents a duty of just law

as such, to an *imperfect legal obligation*; to a duty which can not form the subject of a judicial action, to be sure, but can otherwise have the effect of an obligation of positive law — in this case that of exclusion of revocation after the payment has been made. It is not a bare “in-debitum” but a legal, though not an actionable, debt that has been paid.

The dispute in the former common German law is thus satisfactorily solved. It concerned not so much the idea and fundamental conception of an *imperfect* or *natural* legal obligation as the question how far the positive law admits and makes use of that idea in its positive determinations. As far as the first question is concerned we find even during the time of the Historical School in the first half of the nineteenth century and in their successors to the present day the formula that “obligatio naturalis” is the obligation of the “natural law.” And when we find that the concept in Roman law was variously referred to “aequitas” or “ius naturale” or “ius gentium,” and is now just as variously based upon “natural view of law” or “equity” or “moral duty,” or something of the sort, this must be charged to the fact that they were not fortunate enough to be in safe possession of a *universal* objective basis; and did not sufficiently master the branch of *just law* as they had mastered that of the technically complete statute law.

The controversy was therefore simply one of technical law. The whole import of the question was merely this: “*To what extent* were natural obligations recognized by the positive law of that time as imperfect obligations? Now that the Civil Code has decided this question, we must put in place of it the investigation of the problem, By what methodical process can we derive with scientific certainty the legal determination mentioned (BGB. 814)? How is it to be systematically analyzed? And in what

ways can the "moral duty" spoken of in positive law show itself effective?

The material must be arranged according to the two principles which present themselves here.

1. "*Moral duty*" as obedience to the principle of respect. Method: The persons participating are mentally placed in a special community. The material to be judged must come from the outside. It arises from the social order as it has come down to us from the past, and from its concrete manifestations. And then comes the prescription we are discussing, namely that the specific consequences of the positive law must not, without further consideration, be realized in its technically limited manner; that on the contrary this specific result should be corrected if it does not agree with the result which, in the given situation, is demanded by the principle of respect. But it would be a violation of the principle mentioned if one should utilize the restrictions of positive law to advance in a one-sided manner his merely subjective purposes; if he should pay no regard to his partner and leave him only to his confidence in the trustworthy and mutual concern of the other party; or, what is worse yet, if he should ignore him after the latter has performed his side of the contract in advance. "*Grave est fidem fallere*" (D. XIII 5, 1, pr.).

Not to do this but to show regard for the confiding party as a *confederate in a special community*, is "moral duty" in the sense we have given it. "For," as a poet of the Fatherland has said, "whether it be State or person, whoso wavers and vacillates, whoso is unreliable and unsteady, whoso does not keep faith, is deserving of death."

Similarly the one party in social co-operation must not ascribe all loss incurred from disappointed confidence exclusively to the partner with whom we have mentally united him. If he acts thus, he violates in the model of just law the principle that should here be applied.

This may be observed in legal practice in the two following ways: (a) Positive law is so restricted that *there is no legal duty at all*. (b) There was a legal duty, but it *can not now any longer be enforced*. The following examples will be arranged according to these empirical groups. Considering the examples we shall find that they illustrate not merely the distinction above considered between technically limited and fundamentally just law (p. 193), but also the distinction between formal and actual law (p. 200); in favor, in each case, of the last mentioned. For the present, however, where we are merely giving, by way of illustration, an encyclopedic sketch, this consideration is of no special importance.

(a) There is no consequence yet so far as positive law is considered. In this case, it may nevertheless be *objectively unjust* for one of the parties to withdraw. And this confidence unjustly betrayed may, as experience teaches, appear under three different circumstances; when one is *negotiating* with another; when one is on terms of *legal obligation* with another, accepting advantages from him without being bound by the positive law to pay him a consideration; and where a person at a sacrifice of his own interest enters into the legal sphere of another for the purpose of helping him.

To the first belong the cases of non-observance of the forms prescribed by law (cf. p. 199). This may lead subsequently to objectively *unjust* conduct. The old question whether "*nuda pacta*" produce a "*naturalis obligatio*" is, as we said before (p. 350), now settled.

We must distinguish between contracts and unilateral declarations of will. In so far as the latter are not intended to give rise immediately to rights, there is no question of betrayed trust. *Breach of trust* alone is "immoral." Hence it is not in itself a "moral duty" to carry out the provisions of inartificially executed wills. Emperor Constantine has said, indeed, "*Indignum est ob inanem*

observationem irritas fieri tabulas et iudicia mortuorum" (C. VI 23, 15). But the peculiar enthusiasm of the Romans for testamentary dispositions has no intrinsic basis. And we must make use of other considerations to determine whether the results of the subjective will of a testator are *objectively just* or not. The mere fact that his volition is unilateral proves nothing; for, as has just been said, we can not speak here of betrayed confidence in the same way as in a contract. The point of view here presented is especially important in case of a sudden breaking off of negotiations. Here a more exact observation may show how eagerly use is made of the fact that the person withdrawing is held to be "morally" obligated. The justification of negative contractual interest,* which the writers on the common law at that time approved, was therefore intrinsically correct. Now this is confined to the specific cases of the Code (122; 179; 307); and in general here too §14 alone can be applicable. In a similar way where a law has been changed, "equitable" regard is had for those persons who relied upon the continued validity of the former law. This may naturally happen also in the sphere of public administration. Thus in the following matter of taxes. On account of the difficulty of presenting a balance of its accounts before the time of the assessor's evaluation, a bank made an agreement with the board of assessors to use as a basis for their valuation the earnings of the last three years, so that the premium on new shares during the current year should not be taken into consideration, since otherwise these shares would be included four times in the computation of the profits. But the commission subsequently refused to abide by this agreement, and the supreme administrative court declared that legal determinations can not be set aside by agreements. But the opinion was maintained everywhere that

* Compare above, p. 318 note.

this was a proper matter for an act of grace; and this opinion can be justified objectively from the point of view here emphasized. The extensive discussions recently held concerning *the plea of a fictitious sale* (BGB. 764) also have their systematic place here. For here too it is felt to be *objectively unjust* when one of the parties appeals to the aid of the positive law in such a way that the firm confidence the other party had put in his word is thereby betrayed in a subjective and arbitrary manner. A juristic person is liable for contracts concluded by its officials in so far only as they acted within the authority delegated to them. In a specific case the officials concluded a contract for the construction of roads, including a certain distance for the building of which they had no authorization. Here also there was an obligation of *just law* incumbent upon the company, else the other party would be deceived in the confidence which they had good reason to have.

A congregation imposed taxes upon its members, which they paid. Then it was established that according to the public law of that State the act was not legally valid, whereupon those who paid the tax brought an action "*condictio indebiti*." According to BGB. 814 this was wrong. A person who claims advantages from a specific association in which he finds himself is, according to our deduction, properly obliged to bear his share of the burdens. —The city had to contribute, according to contract, to the maintenance of a government trade school. The school was not well attended. Accordingly it was closed by mutual agreement. Two teachers received a pension, to which the city contributed in proportion. Then it was found in the contract that the city is obliged to contribute only "as long as the school is in existence." Its claim against the treasury for "*condictio indebiti*" of the contributions made after the closing of the school is, according to BGB. 814, unjustified; though it is true at the same time that no successful action can be brought against the

city to compel it to continue its contributions in the future. They had combined for a common purpose. The city had derived advantages from the school. It is therefore objectively justified that the costs incurred by properly carrying out the common purpose, shall be borne in common. If the contract, and with it the positive law, determined the matter differently in certain limits, it is because of that freedom of scope which, as we said before (p. 227), is given here by law to *personal* judgment. But it does not change the fact that there is a duty of *just law* resting, in this case, upon the city, and carrying with it its peculiar consequences.

The position of positive law toward the third of the possible cases above mentioned is different. Compare the provisions of BGB. 683 and 693. It is to be noted especially that an erroneous belief on the part of the "negotiorum gestor" that the business management is really in the interest of the principal, does not justify his claim to indemnity; but positive exceptions are nevertheless made in his favor according to 679. The Roman jurists admitted this also, and based it upon "aequitas" (cf. D. III 3, 46, 6; XI 7, 14, 6). As a matter of fact, indemnity for expenses incurred in good faith for another would be as a rule a duty of just law.

(b) The right can not, so far as positive law is concerned, be exercised any longer; but this inability would bring about an objectively *unjust* result. In that case we must recall the proposition, "Etsi nihil facile mutandum est ex sollemnibus, tamen ubi aequitas evidens poscit, subveniendum est" (D. IV 1, 7 pr.). In our law we must apply BGB. 814.

A note was returned with protest and paid by the indorser. Subsequently the latter demanded the return of the amount because the protest was unjustly made. A similar thing may happen in discharging a claim in consequence of a valid judgment. To all these cases is

applicable the consideration of Ulpian, "Licet hoc iure contingat, tamen aequitas dictat iudicium in eos dari, qui occasione iuris liberantur, ut magis eos perceptio, quam intentio liberet" (D. XV 1, 32 pr.).

An interesting question, which happens not seldom in practice, but has not yet found expression in literature, is the following: Is it the duty of the guardian, employee, or other administrator of another's property to defend the latter against a third creditor by pleading the statute of limitation? The statute of limitations pertains to the means of *formal* law and is opposed to *actual* law (p. 201). One may waive that plea, in which case there remains an imperfect legal obligation (BGB. 222; 223; 225). But the payment of an outlawed obligation is also a duty of *just law*. For the creditor had a right to expect its fulfilment; and he carried out his side of the performance or in some other way arranged his conduct accordingly. However true it may be that he omitted to report the case in time and take legal steps, this does not destroy the claim or the obligation as objective existences. Now the guardian, and correspondingly the administrator or the responsible manager of a property, has even the right to make gifts in response to a "moral duty," as we shall explain in the immediate sequel. We can not therefore avoid the conclusion that he is quite justified in paying an outlawed debt, and that in fulfilling this duty of his ward according to just law, he can not be held liable, either by the court of guardianship or by a subsequent action on the part of the grown up ward.

2. "*Moral duty*" in obedience to the principle of participation. The Romans suffered continually with the canker-worm of slavery. And the memory of it created "favor libertatis" as a duty pertaining to every "civis Romanus" — not as a duty of positive law, but yet of "naturalis aequitas," "quia favor libertatis saepe et alias

benigniores sententias exprimit" (D. XXXV 2, 32, 5). Ulpian tells the following. A slave was freed in a will if he paid the heir ten coins. In a codicil he was given his freedom unconditionally. His master died, and the slave was free. But as he knew only the testament and not the later codicil, he paid the heir ten coins. Subsequently the matter was cleared up. Now the question is, Can he bring an action "condictio indebiti" to recover the ten coins? "Et refert patrem suum Celsum existimasse repetere eum non posse: sed ipse Celsus *naturali aequitate* motus putat repeti posse, quae sententia verior est. . . ." (D. XII 4, 3, 7).

In general we must always assume that there is a "moral duty" where the neighbor would else be left to himself alone. This would constitute a contradiction. An *isolated partner* is a contradictory concept. One can not separate himself from the community of men, for this would denote the negation of one's own existence. And we can not restrict in place or time the community we have with a person in need; for we are not dealing here with a determinate positive combination as a basis for obligations of *positive law*, but with the methodical idea of a separate community with our neighbor as the basis for duties of *just law*. And this method of community with a person in need can not be changed at will.

That we must not, in following this method, ask about the person of our neighbor, was proved before (p. 217). We must apply here the doctrine there developed of the concentric circles. The *existence* of the duties of just law is not in any way affected by the circumstance that perhaps other persons under the law are, according to the idea of the concentric circles and its application in a given positive law, nearer to the person in need. If we consider the matter properly, it remains a duty to help even a person who is abused by his immediate partner, for example, if he is neglected and left alone by the

person whose duty it is to take care of him, or is *unjustly* exploited by his creditor.

But it is only the *existence* of the duty to render immediate assistance that must be maintained here. The *manner* in which this is to be given remains for the present undecided. It may be sufficient here to make an advancement to the person in need, using the term advancement in the general sense to include also performances for which later an indemnity is to be given. The situation, however, may also be such that the only way to respond to the "moral duty" of the Code is by a *final* dotation. This latter is to be found in *gifts* more than in *performances*.

For the rest I thought I would not require to cite many examples in illustration. Every one who is familiar with legal cases will easily see the application of the principles here developed.

Gifts responding to a "moral duty." (BGB. 534; — 1446; 1641; 1804; 2113; 2205; 2330.).

There is no necessity here of going into a new theoretical dissertation. Gifts described in the above formula are those in which the giver has the conscious purpose of doing something which he is not compelled to do by positive law. And the question whether this is an adequate fulfilment of "moral duty" as intended in the Code, must be answered here in the same way as we have just done in connection with *performances*.

In this way we dispose in particular of those gifts generally embraced under the name of *remuneratory* or *compensatory*. These are gifts which are intended to reward a service previously performed by the donee, primarily for the present donor; though it may be, as the Prussian state law says, that "a praiseworthy act" is the occasion of a compensatory gift. Here the idea of spontaneous liberality recedes somewhat in the background and there appears the idea of a faint duty to make

a compensatory gift. This question must have been of greater importance in the law of antiquity on account of the custom then prevalent by which free citizens were not as a rule paid for their services, than it is now when the value of paid vocational work has been changed to the other extreme. And its importance has disappeared altogether as a result of the specific determinations of BGB. 612 and 653, and other similar regulations. Nevertheless the concept mentioned and its specific character are still of importance.

Accordingly compensatory gifts are in general, to be sure, classed among voluntary dotations; but they have been treated differently in the particular codes. In particular they have, as a whole or in some important applications, not been made subject to the rights of withdrawal or recall, permitted for various reasons in ordinary gifts. The present Civil Code has no such dividing regulation. It does not mention the concept of a remuneratory or compensatory gift at all. Hence the latter can be treated in the same general way as the paragraphs just enumerated, which deal with gifts in response to a "moral duty." Compensatory gifts are to be brought under this head when by accepting a voluntary act, the person seems to use the agent of the act as a mere means for himself. From the standpoint of our mental community the agent may appear as the object of an arbitrary and one-sided exploitation, which can be avoided only by a compensatory dotation on the part of the one who is able to make it — a dotation not directly commanded in the positive law.

Examples of this can be found in recent practice in plenty. In the Corpus Juris, as is well known, a gift made in return for having one's life saved, has been designated as "*donatio irrevocabilis*" (D. XXXIX 5, 34, 1). In modern judicial administration there are many cases especially in which compensation is made for trouble taken in the management and administration of property or in

the care and arrangement of particular business. Or dotations are made to relatives and other closely connected persons who gave indispensable support to the present donor in his affairs. A widow expresses herself in a document of this sort to the effect that "her son had not expected or received any compensation for his service, but that she felt it her duty to compensate him to some extent by the gift."

We need not suppose, however, that this kind of gift is found only where the performance is not usually paid. Such gifts may also be made to persons who receive compensation for their services, physicians, for example, legal advisers, trustees and others. And it is possible in a given case that gifts responding to a duty of just law may coincide with performances that may be compelled by positive law. Thus a proprietor declares in a document signed by him, "that he presents two thousand marks to his housekeeper as an expression of gratitude and as compensation for the faithful and disinterested services she gave him during many years, as well as for her self-sacrificing care of him during his several illnesses."

Compensatory gifts in which the characteristic of obligation according to just law is wanting, would come exclusively under the general propositions governing contracts of gift. Thus, for example, simple mutual gifts between well-to-do people. But there is yet another specific determination of our positive law which belongs in this connection.

§ 2. *Consideration for propriety.* — In all the determinations of the Civil Code that have just been treated there is always added to the expression "moral duty" the phrase quoted at the head of this section. A free performance is not subject to return, a gift is not subject to withdrawal or recall, and a person responsible for a property has the permission to make a gift from that property — if the dotation "responds to a consideration for propriety."

Propriety belongs to *conventional rules* (p. 180). It differs from ethics in that it has to do solely with the direction of *external conduct*, and not with forming the *inner intention* of the person subject to it. It is true, indeed, that we sometimes use inaccurately the word "proper" ("decent") in the sense of *morally* good. And sometimes the fundamental social concepts are very much confused, as in the following judicial decision of the highest court of appeal. "In any case it must be firmly maintained that the concept of *moral obligation* must not be extended, beyond the sphere of vital and ethical duties, to relations in which merely a *certain consideration* of *fairness* recognizes an obligation to pay, or where *external propriety* is the only thing that might forbid a claim for return."

In separating propriety, as a conventional norm, from law, we must not regard the person of the subject. For this is the same in both. The same person is addressed by two kinds of rules. The latter, accordingly, are already logically distinct when they confront the person addressed. The logical distinction therefore depends upon the essential peculiarity of the rule itself. How it is received by the person addressed is of course immaterial so far as the inner meaning and hence the formal distinctness of the two modes of address are concerned. And surely it can make no difference for our problem which of the two kinds of norms produces the greater effect in a given case upon this or that person.

The formal differences of the two groups of norms for conduct are found in a peculiar idea which accompanies all the particular propositions on both sides. To observe and determine it is an indispensable condition for a clear insight into the difference here spoken of. I call this universal idea which accompanies all social rules in a two-fold form and makes possible their classification, the *claim to validity*. It must be critically distinguished from the specific empirical material of concrete norms, although

in reality, to be sure, it appears in social experience inseparable from it. But general classifications can be made clear and precise only if made according to these *conditioning elements* and not according to the *conditioned material*, which is constantly changing and in its unwieldiness can cover and master and classify a limited sphere only.

For our present question the formal meaning of social norms as determining the one class or the other can be easily expressed. In the one case the accompanying thought is, *If you want to have advantages, follow this rule*; in the other it is, *You, whom I am addressing, are subject to me*. The universal and logical mark of differentiation therefore which holds the conventional rule apart from the legal is the *meaning of their claim to validity*.

On the other hand, it is scarcely possible to give an objective and precise definition of the concept "propriety" within the conventional rules, and it is more a question of linguistic usage. In general the word in question can be applied to all conventional propositions, except in so far as concerns certain definite relations. Thus we can scarcely use the word in connection with the rules of duelling or agreements in games; or in specific conventional rules, such as those relating to the ceremonial of the courts or to drinking customs among students. In other connections it is used with other synonymous expressions, for example, politeness, manner and custom in "social" intercourse, and so on.

In interpreting and applying the legal determinations cited at the beginning, it will be well not to follow this terminological discussion too far. In particular, "propriety" in the sense of avoiding offensive external conduct, particularly in sexual matters, does not concern us here at all. The same applies to the use of the word in the sense of sparing another's sensibilities as may be commanded by law or convention (cf. D. XLVII 10, 15).

We are concerned with the meaning of the word in those eight paragraphs. As they all deal with *performances* or *gifts* which are supposed to respond to a duty of "propriety," therefore, in the first place, every dotation belongs here which is regarded as obligatory by the conventional agreement of the circle or group to which the person making the dotation in general belongs. This must be gathered and established as basic material by the person concerned or his representative and counsellor and possibly also by the judge trying the case. As a sure example may be mentioned the customary mutual gifts or the presents given as a token of personal participation on occasions of weddings, baptisms and funerals. Another example no less certain is the matter of *tipping*, so harshly treated recently. It is not easy to see why a performance of this nature pertaining to the custom of tipping should appear to be objectionable. For it constitutes first of all a kind of voluntary tax for the person who can afford it, and it works against undesirable greed. While it pays for a trifling service out of all proportion to its value, it is nevertheless far removed from humiliating charity and equalizes in a harmless fashion the accidental inequalities of income. And when we give a tip to the servant of our host, there is an additional benefit. It brings something to the entertaining house which — as things are — it could not secure for itself in any similar manner, namely, better humor on the part of the servants and greater willingness to serve. This can not be accomplished by expecting the host himself to give his servants extra compensation for such occasions, because they would simply think of it as additional wage for extra service, whereas the gift of a strange guest can awaken a friendly humor in quite a different manner. It is a mistake therefore to entertain such strong and fundamental opposition to tipping as has existed since the eighteenth century and possibly earlier. But it is

true enough that the custom may evidently degenerate in abuse; and besides, even in its regular use it is far from what is called in the law "moral duty." It responds merely to consideration for "propriety."

But the question is, Is our task finished when we have determined what in a given group of persons is regarded as "proper"? Should we not also try to find out whether such a view deserves real approval? It might seem that the answer which affirmed the necessity of such critical consideration might be found to be too simple. When the guardian makes such large gifts to third persons from the property of his ward that the latter or those legally entitled to his support are thereby deprived of the means of subsistence, we are at once led to the critical examination in question. And the question can scarcely be settled by the claim of the guardian that such gifts as he made, in quality as well as quantity, are customary in the social circles to which his ward belongs. But if this is the case, how can a requirement of *external propriety* be at all distinguished from a norm of *just law*?

The solution is this: A consideration for "propriety" need not coincide with a definite command of *just law*, but neither may it offend against the principles of just law. Accordingly we may first of all distinguish in permissible gifts (a) such as are commanded by just law — "moral duty"; (b) such as are not prohibited, in which case they either respond to "propriety" or are quite free. And we must not in general object that there always are men who suffer hunger and misery, and therefore there was always a *neighbor* as against the person receiving the gift. In specially severe cases this objection may be valid. In times of famine, disease and war, private gifts of large amount may easily be in opposition to just law, even if they are not exactly such as were given to Lady Milford. But it can not be maintained that a person has an absolute duty to *search* for needy persons before he makes any gift.

It all depends upon circumstances and specific social institutions. In fact it may even be that unregulated interference of private benevolence, frittered away in small amounts of alms and dotations which lead the beneficiary to inappropriate conduct, is actually *unjust*.

§ 3. *Indemnity as a matter of fairness.* — Laborers in electrochemical works are often subject to so-called industrial diseases, which arise as a result of constant occupation in those trades. Recently “chlorakne” has been much observed. It consists in the inflammation, swelling and enlargement of the sebaceous glands. Hitherto it has been found exclusively in certain definite occupations, in electrolysis of chloralkaline solutions. Although a close connection is thus certainly established between a specific mode of producing well-known chemical substances and the development of an unusually characteristic skin disease, medical men are still completely in the dark concerning the precise mode of action of the factors involved and especially concerning the real causes of the injury.

A workman who was employed a year in such a factory and then contracted the illness above described, demanded an indemnity. By a judgment of the working-men’s Insurance Department of the Empire the insurance claim was rejected because it was not a case of an “accident” but of “illness,” which is no ground for an indemnity claim. The injured workman then went to law. The evidence showed that the factory had done everything in its power to protect the health of its workmen. The workrooms were a model of cleanness and ventilation. Adequate provision was made for taking care of the skins of the employees. And the factory employed paid specialists to discover the nature of “chlorakne.” How should the case be decided?

In the second Draft of the Civil Code was found a proposition upon which the plaintiff could base his claim.

According to this rule a person who was the innocent cause of an injury must nevertheless make it good in so far as fairness according to the facts and especially the circumstances of those concerned requires indemnity . . . (752). But in the third Draft and the Code (829) this regulation has not been retained with the same generality. Here the obligation to indemnity as a matter of fairness is laid down only in case the agent is irresponsible and would not be liable according to the general norms of criminal obligation. According to this the rejection of the charge was in my opinion justified.

But at any rate we see that the law actually in force has introduced to a limited extent indemnity as a matter of "fairness." This use of the expression differs from the previous applications of the term as a desire, in particular situations, for *just law* (p. 288), in this respect, namely, that not merely the *carrying out* of a legal obligation but its *existence* also is made dependent upon the consideration of "fairness."

In the practical application of BGB. 829 the obligation to pay indemnity must be utilized in doubtful cases. The present wording might leave this open. But in the original motion as made in the Commission, which has remained the basis of the present regulation, the point is stated more clearly thus: "The agent is obliged to make good the injury in case and to the extent that, according to the circumstances of the case and particularly the relations of the persons concerned, *refusal to indemnify would be in violation of good morals.*" And this was changed later in expression only but not in real meaning. And it has its inner justification. The traditional opinion of Roman law laid the burden of such accidental injury upon the injured person alone. He must bear exclusively the loss caused by another member of the community. In the spirit of the idea of community this is altogether unjustified. According to this, the presumption is in

favor of both the persons concerned bearing the loss in common. And there must be some special reasons why positive law has deviated from this principle, reasons which, as we have seen, are not evident in the redaction of the law.

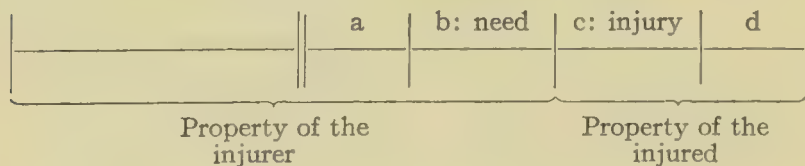
There may, however, appear elements in a given case which would favor the denial of indemnity obligation in the spirit of *just law*. For example, in case of a very trifling loss; or where the injured person is himself at fault, as for example when he annoyed the injurer, in which case it was the latter and not the former who was the subject of abuse; or in case of a misfortune from which both parties suffer equal loss, so that to lay the burden upon one side alone would seem out of the question. A case may occur in which the incompetent author of the injury can point to certain claims arising in favor of the injured party as a result of the injury — claims against loan institutions or insurance companies; and different from the mere “*beneficium excussionis*”^{*} spoken of in BGB. 829 in reference to persons under obligation to control the agent in question. To be sure, it is conceivable that even after a successful reference to those other claims, we may have to return to the author of the injury, if the demand made against the third person proves ineffectual.

It is also possible that two questions of “equitable” claims for indemnity may cross each other, as in the following case. A carabineer, Vincenzo Riggio, who was stationed in the village Roccamonfina in the Vesuvius, became acquainted there with Carolina Trucco, a girl of honorable family. She was a beautiful girl of fifteen, and the soldier fell in love with her, and sued for her hand, which her father promised. On account of the girl’s extreme youth the marriage was postponed for a year. But it was not long before Carolina confessed to her parents that there was no time to be lost about the

^{*} [Prior suit against the principal debtor.]

marriage. The father of the girl immediately consulted the bridegroom, but the latter sought to evade the matter and finally declared roundly that he did not want to marry the girl. A violent scene ensued, in which the girl lost all control of herself and in a burst of irresponsible fury shot her seducer to death. According to our Civil Code the considerations of 1300 or 825 and 847 would stand on the one side and those of 829 on the other. Putting both parties mentally into a special community, we must pay down, so to speak, the loss suffered on both sides, and decide the question of indemnity under the specific conditions according to the first principle of respect.

But as soon as it is established that "fairness" recognizes the claim to indemnity, the extent of the claim is decided by the general rules concerning the computation of damages. If it is a case of damage to property which may be estimated in money value, we apply the positive propositions of our law. If it is an interest which can not be estimated in an equivalent property value, we make use of the method given above (p. 296). In our specific case we may also make good use of the following consideration.



If c falls on the side of the injurer, the matter is settled. In the contrary case, the loss is borne by both in the ratio of a : d.

§ 4. *Deliberate injury in violation of good morals.* — The Civil Code lays down, in 826, the proposition, "One who deliberately injures another in a manner violating good morals is bound to indemnify the other for the injury." This proposition appears as a general supplement to those facts which our law in the Civil Code and other

supplementary statutes characterizes as giving rise to an "obligatio ex delicto." They are established in a technical form of expression. In so far as they have to do with *deliberate* injury, they do not constitute anything new as facts. Their *raison d'être* as special facts lies either in the circumstance that they are intended to remove any possible doubts that may arise concerning the subsumption of certain injuries under violation of "good morals"; or in the fact that they have in view a specific kind of legal consequences for determinate offences of this sort.

To go through the specific facts and expound their meaning is the business of technical legal science. We shall therefore set aside the question concerning the scope of the particular, strictly defined and specific determinations; and with it also the consideration, *at what point*, according to these, the general determination of our paragraph finds its application. In the present connection our chief interest centers about the meaning of the supplement expressed in BGB. 826 and its application in a given case.

It is well known that the proposition quoted at the beginning of this section appears as a development of what is known in Roman law as "actio de dolo." The edict of the Praetor declared in this connection, "Quae dolo malo facta esse dicentur, si de his rebus alia actio non erit et *iusta causa esse videbitur*, iudicium dabo" (D. IV 3, 1, 1). Now it is to be observed that in all the numerous expositions the words italicized above have found no explanation. This is true already of the Roman lawyers. According to the extant fragments of their writings they composed a great many expositions of the concept "dolus malus," but we miss a fundamental discussion of the second requirement of "actio de dolo." The modest reference to the fact that such action is not admitted in cases of small amounts (less than two "aurei") and can not at all be brought against certain prominent

persons, can not satisfy the desire for a fundamental understanding of what "*iusta causa*" really means.

And now the same thing appears to-day in the general rejection of injury done in violation of "good morals," which has been positively introduced in the Code. More attention is given to the concept of "deliberation" or "design." And in particular it has been established as the prevailing opinion of jurists that it is not necessary for the application of BGB. 826 that the agent should have been aware of violating against "good morals." But what these last are — what kind of a norm is required by them, by what method they can be laid down and mastered (without concealing ourselves behind the unproved assumptions of ourselves or others) — this has so far (at least to my knowledge) not been done in systematic fashion.

We shall now try to establish this upon the basis of the theory of *just law*. For "good morals" or "*iusta causa*" are accidental expressions for the principles of just law (cf. p. 35). To carry them out we must make use of the method shown above. The author of the injury and the injured are mentally combined in a special community according to the rules of the *model of just law*. At the same time we must bear in mind the object for which this special community was formed. Now if the one person treats the other in a manner violating the principles of just law, the community must again mentally be dissolved; and the adjustment must take place by withdrawing what has been deposited or by making it good.

The injury which may result in this connection may correspond to the three general directions of legal imputation according to the types of performances generally (p. 223), *viz.* an injury to one's own person, to persons legally entrusted to one, and to property (in the broad sense). According to the technically chosen means of

our civil law, the third class does not represent a loss resulting from the direct injury of an object of property, because this is covered by the prescription of BGB. 823. But it represents *indirect* injury; as for example an injury done by indirect influence upon the person of the injured or his kin, or by hindering his power of acquisition, or even by the omission of obligatory aid.

We will arrange the possible cases according to the system of the principles of just law. And we make the observation that, technically speaking, we naturally make use of the ordinary legal rules to determine the injury, in particular BGB. 253; and, in accordance with the general types, the manner of injury may be such that the tort-feasor is simply opposed to the injured, or that the injury is the result of a combination among several tort-feasors.

1. *Injury in violation of the principles of execution.*

(a) *Offending against the second principle of respect.* In the "Report on the First Draft of the Civil Code" there is a treatment of assignment of claim which is done for the purpose of cutting off and withdrawing from the debtor his defences against the former creditor. The "Report" says properly that this is in violation of "good morals." The justification of this can be easily derived from the place we have given this case in our system. To be sure, there was a difficulty here according to the first Draft, inasmuch as it did not recognize the *exercise of a concrete right* in violation of "good morals" as a ground for an indemnity claim, but only "such an act of this kind as is permitted in virtue of general freedom as such" (I. Draft, 705). This would have led to difficult *technical* distinctions. For example, it is not clear why the assignment of a claim should follow from "general freedom as such" and not be rather a definite exercise of a creditor's right. But for the real question, whether a given thing corresponds to just law, this limi-

tation is of no importance. Nevertheless the subsequent Drafts still contain the provision that an obligation to indemnify for deliberate injury in violation of "good morals" exists, provided "the act is not such as was done in the exercise of a legal right." This was then in the last moment properly stricken out. And now that the Code has not taken up the distinction between the exercise of a right and an act of general freedom, there is no reason why we should come back to it. And it is necessary to bear in mind and to emphasize that the legal results of BGB. 826 can in no case be evaded by the mere excuse that the author of the injury was exercising his right.

Accordingly, when the father "abuses" his right to care for the person of his child, an indemnity claim is justified under all circumstances according to 826. And the same will always be the case where there is "abuse" in family law. And therefore even in those cases in which, by reason of the positive limits of our law, the abusive act can not be prevented by legal recourse (p. 279), indemnity can be demanded according to 826.

Intrinsically speaking the same may be said in reference to unjust fulfilment of obligations. But in as much as the debtor, by reason of the existing obligation, is already liable for indemnity in case of deliberate non-performance in violation of "good faith," there is no ground for making another similar obligation on the basis of 826 (cf. D. XVI 3, 1, 7). But the latter determination may very well find its application against a *creditor* who has insisted on the fulfilment of an obligation in violation of "good faith."

(b) *Offending against the second principle of participation.* In the section on the exercise of exclusive rights we had to establish that the law now in force permits an *unjust* exercise of those rights (p. 251). The small limitation of this permission in the so-called "paragraph

on malice" (226) is in fact again only a restriction of the right in its endeavor after *justice*, and is practically without particular importance. Fortunately, however, this is supplemented in a better and more objective manner by allowing a claim for indemnity when the unjust exercise of an exclusive right, in particular the right of ownership, results in a financial loss. This may easily appear as a direct violation of another's right and come under BGB. 823. It has been so decided recently in connection with the use of barbed wire on public roads for the protection of private property. A passer-by who left the road without any fault of his and was injured, rightly had his claim for damages recognized, in accordance with the above consideration.

But there are injuries possible here which do not consist in the violation of a right. For example, in preventing one's neighbor by an unjust exercise of property rights from following his occupation, as was the case in the action of the miller Arnold. It must be further observed that actions for disturbance of possession or for freedom of property do not involve indemnity; which may, however, on the basis here presupposed, be demanded by way of supplement in accordance with BGB. 826. Or in the following case: One sells real property to a person of whom he knows that he will engage in a noisy occupation, or will otherwise undertake illegitimate interferences, and that too with the design of injuring his neighbor. If it can be shown that this method was deliberately chosen in order to effect the injury of the other person, it may come under 826, whereas if it was due to a negligent disregard of the possible injury, our paragraph would not cover it.

2. *Injury in violation of the principles of existence.* We shall make the same systematic division here, according to the different principles, as we did before; but in each class we shall have to make a further subdivision

according as the injury is caused by an *act* of the agent or an *omission*.

(a) *Offending against the first principle of respect.*

(α) *By an act.* This is found in illegitimate *interference* with the injured person himself or with those legally belonging to him. The former is the case without any doubt where a person "is induced to make a declaration through deception or unlawfully by threat" (BGB. 123). In that case he may not merely *contest* the declaration but, according to BGB. 826, he has a claim for indemnity besides: "*Nihil consensui tam contrarium est, qui ac bonae fidei iudicia sustinet, quam vis atque metus: quem comprobare contra bonos mores est*" (D. L. 17, 116 pr.; cf. D. IV 2, 3, 1; XLVII 11, 1, 1). Especially frequent are those cases in which a person falsely represents himself to be authorized to do certain things; as for example in the case of the social ball when a friendly gentleman kindly undertook the trouble of collecting the cost of the invitations, and then also sold bouquets for the cotillon, which a zealous member of the committee brought to his counter, and then disappeared. The matter may take a peculiar form when a minor pretends to be of age and later desires to appeal to his limited competence; since the legal limits of the age of business competence are different from those of criminal responsibility (cf. D. IV 3, 13, 1). Deceptive advice or recommendation also naturally belongs here (D. IV 3, 7, 10; ib. 8; ib. 40; — BGB. 676).

The law we are now considering may also be violated by injurious interference with persons belonging, or legally entrusted to one. The deceived husband can appeal to BGB. 826 against the seducer of his wife; whereas the conduct of Iago has been covered in the previous paragraph. And in the seduction of children or the enticing of girls to permit unchaste acts, that claim is well justified in itself (D. XI 3, 14, 1). To be sure its execution

is again narrowly limited by the positive regulation of BGB. 253.

(β) *By an omission.* In the correction of the Land Register, he has to bear the costs who demands the correction (B.G.B. 897). Here Dernburg asks the question, "Does this hold also in case the reversionary heir demands the entry of the immediate heir?" He answers it in the negative, because else the immediate heir would be able by means of delay to throw the costs upon the reversionary heir; and this he calls "deception." This is certainly a just decision. The *real* justification again follows from the place we have given it in our systematic discussion. The *technical* explanation is this, that the reversionary heir must pay the costs in the first place, but he can demand indemnification, according to BGB. 826, from the immediate heir who injured him designedly.

Here belongs also the often discussed case in which in contracts the one party sees an error of the other and says nothing in order that the time for contesting the agreement on the part of the one in error may pass by and his obligation become established. To be sure, this would not be of great importance, for the *second* paragraph alone of BGB. 121 would decide the case in the fact assumed. But we may very well subsume under our present systematic point of view all other cases in which one of the persons concerned, with intention to injure, allows a period of time to elapse, which deprives the other party of a certain right and gives rise to a legal obligation on his part.

(b) *Offending against the first principle of participation.*

(α) *By an act.* A working woman made a patentable invention but had not yet received the patent. She went to a businessman and inquired about the possibilities of utilizing her invention. He made her explain the matter to him and then applied for a patent on his own account.

Here is another case. A person has prospected but has not yet taken up claims. Another person makes use of this, gets ahead of the other and takes up claims for himself. Or the following: The buyer of real property was not yet entered on the register. Accordingly the owner makes a more advantageous bargain with a third and transfers the property to him. Or the following. After the conclusion of a contract of inheritance the testator on his death-bed sold his real estate to a third person for a very low price. Their purpose was to annul the right of the contractual heir; and they inserted as a consideration the support of the vendor to the end of his life, although they both knew that his condition was hopeless.

It is told of the glossator Bulgarus that he taught that ownership in wild beasts caught in traps can not be acquired by that fact alone; and hence that a stranger taking out such a beast from its trap is not guilty of larceny (cf. D. XLI 1, 55). When Bulgarus soon after — so we are further told by Savigny — rode with one of his pupils in the neighborhood of Bologna, they came across a wild swine that had been caught in a trap. The pupil wanted to take the animal with him; and when held back by Bulgarus, he referred to the lecture above mentioned. Bulgarus replied, "It is true that we have no fear of an action, but regard for our good name should keep us from doing this — *scandalum magis timeo, quam iudicium futurum*" (Gl. ad J. II 2, 14).

In all these cases an exclusive right is acquired by a person without regard to the interest of another who had a valid reversionary right thereto. The person acquiring the right offends against the idea of fundamental regard, which follows from the aim of social life and work. He knows the will of the other and the act which he began, and he hinders him with his own purely subjective desire and arbitrarily excludes him. This would, however, not be the case if for example the second party might assume

that the first would be adequately indemnified. For in this case there is no necessary contradiction between the idea of just law and the specific act.

Such a hindrance of another may also be found in an action brought by the plaintiff with the conscious intent of injuring the defendant. It is worked out in a peculiar way in the case recorded in D. IV 3, 9, 3. In modern times a great deal of attention has been devoted to the abuses arising from legally granted freedom, which in very many cases has not proved to be the right means for the attainment of just law. Without considering the limits which have been slowly but surely drawn in this matter in recent legislation, we must examine the question here whether it is possible to place such abuses of freedom under the provisions of BGB. 826. These are met with especially in business life — extreme underbidding in the price of commodities and services, even sacrificing things below cost price in order to ruin a competitor in the business (cf. p. 335); withholding of payments, in order to force one's creditor into bankruptcy; or as is illustrated in an action where a steamship company notified a few firms who were interested in the business of sailing vessels that their freight regulations everywhere in force would not apply to these firms. Its purpose was by means of this oppressive business measure to induce those firms to act in accordance with the wishes of the company, whether it be to interfere with the sailing group in the interest of the company, or to break off their business relations with the sailors.

It is clear that the last case may also be considered from other points of view mentioned before; and it is in general possible that a given mode of conduct has effects in various significant directions, as may be the case for example in publishing other people's secrets with injurious intent. From the point of view we are at present considering such an act in business would mean the arbitrary exclu-

sion of others in the interest of one's own purely subjective desire. This may appear also in private life generally, as for example (as others have already pointed out) when a person makes music with the deliberate purpose of annoying his neighbor in the next room to make it impossible for him to continue his work of instruction.

We must consider in the same way the question that has often come up recently as to the liability of agitators in labor strikes to pay indemnity. Such obligation can neither be affirmed nor denied offhand. Pomponius is much too sweeping when he says, "*Culpa est immiscere se rei ad se non pertinenti.*" (D. L 17, 36). It depends on the manner of interference. It depends whether it acts in the interest of objective equalization or whether it is mere personal incitement. An agitation urging the people to begin or continue a strike would come under the consequences of BGB. 826 if it expresses itself in the spirit that the persons concerned must be prevented from settling their difference *justly*. Arousing personal bitterness, fomenting subjective ill-humor kills the spirit of friendly negotiation and makes a just ending of the strife impossible. In such a case the agitator offends against the first principle of just law. He is the cause of subjecting the will of the one party to a one-sided and arbitrary personal desire; and aims to exclude the one party from its own objective participation in social co-operation by the arbitrary determination of others. It may well be that he does this in the erroneous opinion that he is thus acting in a "moral" and justified manner. But we are not now concerned with passing judgment upon his *intention*, but with the manner of his *conduct*, with the question of *just law*. The conduct of Bratt in Björnson was wrong for the same reason, not because he undertook to do something which "transcended our power," but because he acted in violation of the principles of *just law*.

It is clear from this that the same thing may appear in all kinds of proscription or boycotting, even apart from the specific determinations of GO. 152 ff. (cf. also above p. 344). To keep a "black list," for example, of tenants who break their contracts or are bad payers, is not in itself inadmissible. For the latest legislation itself makes use to some extent of such an arrangement in connection with the data of disclosure (CPO. 915). But such a combination of business people, as in the case of trusts and cartels generally, violates just law when in specific circumstances it acts in such a way that the person aimed at becomes a mere tool in the disposition of others, is robbed of the ability to determine his right occupation for himself and is excluded from the life of the community by the arbitrary desire of third persons (cf. p. 345). If it is said that the employers may keep black lists to protect their "just interests" and may communicate these lists to the other employers of labor, nothing can be said against it provided the emphasis is laid on "*just* interests." They must be such interests that their protection is commanded by the principles of just law. It appears justified therefore in those cases where without such mode of procedure an industry would find itself in a position where it would become an object of the personal, one-sided and arbitrary commands and determinations of labor combinations. On the other hand, it can no longer be justified objectively when by secret blacklisting of workmen the exclusion is not undertaken for the purpose of bringing about a just mode of co-operation, but as a means of arbitrary decision concerning their participation in the social economy, according to the one-sided desire of the one party.

(β) *By an omission.* The prevailing consensus of lawyers has long been that it is possible in this way to offend against BGB. 826. According to this opinion the responsibility arises as soon as there is an obligation

of positive law to act and the person concerned omits to do so. "*Qui non facit quod facere debet, videtur facere adversus ea, quia non facit . . .*" (D. L 17, 121). As an illustration has been cited the case where a witness designedly omits to mention an essential circumstance and the defendant is condemned as a result (cf. D. IV 3, 21). The person is excused only in case he was unable to prevent the result effectually, "*Culpa caret qui scit, sed prohibere non potest*" (D. L 17, 50).

Now as the Code in 826, by its use of the expression "good morals," lays down the general observance of just law as a decisive norm, the results of this paragraph must be applicable in all cases where there was an obligation to act in accordance with the principles of just law, and it was not carried out. When such a thing must be assumed has been expounded in detail in the first section of this chapter, and it will be sufficient here to refer to that place (p. 349; 351; 356).

Every one must desire that the community in which he is legally placed as a member shall actually recognize him as such; that he should not be left in an accidental situation as a person who stands isolated and alone. For this is opposed to the fundamental idea of all law, that all should carry on the struggle for existence in common. And what he has in mind and desires for himself, that he must also grant to every other associate in the law, else an intolerable contradiction would find its way into the meaning and aim of the law.

Now it is indeed true that important doubts have been expressed in reference to the application of this idea in concrete cases. "I take a walk on the bank of a river," says Liszt in his suggestive presentation, "and see a man fall into the water and struggle with the waves. As a good swimmer I could save him without incurring danger. I omit to do so though there is no other help at hand and I see that he must drown. My liability according

to 826 can not in my opinion be denied." Certainly not. But why should it not be enforced? It could be rejected only if the result did not agree with the principles of just law, but on the bare facts as just described the result of that law would be in full harmony with our principles. If it is possible to help the drowning man by throwing him the life-saving ring on the bridge and it is not done, the case remains the same from our point of view. Nor is the matter changed in any way if the drowning person threw himself into the water with suicidal intent. For the only question of importance is whether the situation is such that through the omission of a possible helper *the person in danger is treated in opposition to the first principle of participation.*

But all doubts will disappear if we bear in mind that the obligation imposed upon the obligor stands for him also under the second principle of respect; according to which he must be able in its carrying out to remain his own neighbor. And in this way we shall be able to adjust with certainty and justice any case in which there may be a doubt concerning the manner of subsuming it. The same will apply to the other cases cited by way of objection, as for example when a person on leaving a train fails to wake his fellow passenger though he knows very well that the latter does not desire to travel farther; or when a person has been cheated by a swindler and knows with certainty that the latter will approach next a person whom he (the victim) knows; or finally when one sees a blind man approaching a precipice.

That by recognizing this civil obligation of just law, the criminal question now takes on a different form, need not cause us any serious concern. If it is true that in that case the criminal law threatens too severe a penalty for an offense against those requirements of just conduct; that it provides for a greater punishment than is necessary to make good the injury that has been caused, then this

unjust criminal statute has to be changed. But it is wrong and mistaken to renounce a demand of the principles of just law simply because in carrying it out it will appear that the traditional penalties are *unjust*.

§ 5. *Accepting a performance in violation of good morals.* — This gives rise to a right of reclamation corresponding to “*condictio ob turpem causam*” of Roman law. It is now expressed more precisely in technical fashion in BGB. 817. We will explain only that part of this determination which relates to “good morals,” against which the acceptance of a performance must not offend; and our exposition will therefore be brief, referring to previous discussions which may be directly utilized here.

As we are dealing here with the reclamation of an unjustified enrichment, it is presupposed that the performance is in the nature of property that is subject to return. This raises a difficulty concerning the relation of our legal determination to the rules on the limits of freedom of contract. It has been assumed that BGB. 138 has reference to transactions which are “*themselves*” in opposition to “good morals,” whereas 817 has in mind transactions in the conclusion of which “the one or the other party, or both, *personally*” act in an illegitimate manner. But this seems in reality to be the same as the difference between just law and ethical theory. For if we make a distinction between a concluded transaction in itself and the subjects who entered into it, we can only mean to contrast legal conduct with inner intention. But the latter is without the scope of just law, which interests us here. Nor can it be a question of passing judgment upon the subjects, for the matter turns under all circumstances upon an accomplished performance and a legal mode of conduct involved therein.

But BGB. 817 has its independent significance within the domain of pure law; and in twofold application.

1. *A performance based upon an illegitimate transaction.* The illegitimacy may be constituted by a legal prohibition or by an offence against fundamentally just law. Such a transaction is in the latter case always, in the former as a rule, void. But if the transaction is merely contestable and is avoided, this makes no difference here (see BGB. 142); for example in a case where a financial advantage has been gained unlawfully by threat, and the forced declaration is contested. If an illegitimate transaction is followed by a performance, there is at first a question of "condictio indebiti." According to the opinion of many lawyers there can even be a successful action of "vindicatio" of the objects handed over, because the transfer of ownership took place on the basis of a void transaction, and is therefore itself void. Others maintain, in the spirit of our law, that it (the transfer of the object) should be considered by itself and without regard to the underlying transaction that caused it. Be this as it may, in any case the reclamation must be made by means of "condictio indebiti" if the object of the performance can no longer be found in specie, or if owing to a rule of law (for example if a third person acquired it in good faith) it can not be followed by the claim of ownership.

Now "condictio indebiti" ceases to exist if the claimant knew that he was under no obligation to perform. Here BGB. 817 comes in and grants a claim for the surrender of the *unjust enrichment* even if the person knew that he was under no obligation, so long as the performance arose out of a transaction that was beyond the limits of freedom of contract. Then there is in addition BGB. 819, 2, according to which, in case of "condictio indebiti," the receiver who knew the facts of the case and received the object knowingly in violation of the principles of just law, is not only liable for the unjust enrichment but is in the position of a debtor against whom an action was begun. Whether these technical complications were really neces-

sary, and whether the matter could not be settled by means of BGB. 826 and a claim for complete indemnification, may be left undecided (cf. D. III 6, 3, 3 end).

There is a difference of opinion in legal literature how an abstract promise or declaration of obligation made in violation of "good morals" is to be treated legally. On the one hand such promises are put under BGB. 138 and are declared void. This does not agree with BGB. 817, according to which such promises can be reclaimed by "*condictio ob turpem causam*," but nevertheless give rise to an imperfect legal obligation even in case of "*turpitudō*" on the part of the person who drew up the document. Those writers must therefore assume an antinomy between the two passages of the Code. This is properly rejected by other lawyers. An abstract entrance into an obligation in the specific legal forms is regarded as an abstract liability. As the merchant enters a received note as "credit", so the giving and receiving of those abstract documents of obligation are regarded as payment in cash. Therefore they properly come under 817 of the Civil Code and not 138. It is presupposed here that a performance has actually taken place. Take the following case. A person went into bankruptcy. To evade his creditors, he made a fictitious assignment of a claim to his brother. The latter was "*doli particeps*." Later the former demanded the return of the document. The second proposition of BGB. 817 is not opposed to his demand; for the assignment of the claim was never actually made, and therefore it is not a question of return by a second assignment, but of the actual adjustment of a legal status that was never changed.

2. *A performance entered into without an antecedent transaction, for the purpose of illegitimate persuasion.* We must not say that no transaction is here in question at all. For since the performance must be accepted by the other party, and this involves adoption of the purpose

of the performance, the latter is in reality accompanied by a business agreement. Then we must first see whether the content of the transaction which had the performance of this purpose as its object falls outside of the limits of freedom of contract. And here again we must refer the reader to the results of our former discussions.

Now we find the statement repeated that the charge of the illegitimacy of the accepted performance must rest exclusively upon the receiver and does not touch the giver at all. This can only be the case if the receiver is to be induced to fulfil a legal obligation, whether it be to do what is commanded or omit what is prohibited. But if the purpose is to induce him to do something illegal, the giver also bears the burden of the offence, which would exclude his claim for return.

We explained above (p. 336) that a person may not receive money for performing or carrying out legal obligations, and an inducement of this sort is not compatible with just law. It makes no difference in this connection whether the obligations are technically framed or whether they pertain to the principles of just law. In practice it is mostly the first that form the subject of discussion. Without the addition of further reasons the Roman lawyers also in particular recognized "*condictio ob turpem causam*" in a series of cases in which a person received money for executing an obligation that was incumbent upon him by positive law. For example where money is paid to a person that he should tell the truth before the court and not swear falsely; or in case of a dotation for abstaining from a temple robbery, theft or murder; or in case of compensation for the obligatory return of a thing entrusted to a person or misappropriated by him (D. XII 5, 2; *ib.* 9 pr.; D. XXVII 3, 5; C. IV 7, 6; *ib.* 7).

But the acceptance of a performance is also in violation of "good morals" in the sense of BGB. 817 when

the purpose of the performance is that the receiver shall fulfil in return a duty of just law which is already clearly incumbent upon him. It is true that there are no examples of this in the Corpus Juris in which it recognizes "*condictio ob turpem causam*"; neither do I know of such examples in later practice. But it is very properly stated there in a general way, "*Quotiens autem solius accipientis turpitudine versatur, Celsus ait repeti posse: veluti si tibi dedero, ne mihi iniuriam facias*" (D. XII 5, 4, 2). And Paulus is quite right when he teaches that, "*Condiciones, quae contra bonos mores inseruntur, remittendae sunt, veluti si ab hostibus patrem suum non redemerit, si parentibus suis patronove alimenta non praestiterit*" (D. XXVIII 7, 9).

That this consideration must be carried out in the spirit of our law follows from our investigations on the limits of freedom of transaction (p. 337; 340); whereas the question of the determination of these duties of *just law* leads us back to the first part of this chapter.

CHAPTER FOUR

DETERMINATION OF A JUST TRANSACTION

§ 1. Interpretation of legal transactions. § 2. The "actual" will. § 3. "Intelligent" estimate of the case. § 4. "Bona fide" interpretation. § 5. A point about which an agreement was intended.

§ 1. *Interpretation of legal transactions.* — When Rome concluded peace with Carthage after the Sicilian War, they included in the treaty the usual agreements concerning those who assisted each power in the war. The parties to the treaty bound themselves mutually not to enter into separate alliances with the confederates and subject communities of the other side, or begin war against them or exercise sovereign power or levy troops in their domains. This took place in the year 513 of the City. About fifteen years later the Romans, in fear of the Carthaginian power that had in the meantime grown up in Spain, concluded an alliance among others with Saguntum. This was the city, as is well known, upon which Hannibal then made his victorious and destructive attack. Did this constitute a violation of the treaty of peace? Must the treaty be interpreted to embrace merely the parties at the time of its conclusion, or does it include all those who came in after?

Livy is quite right when, in judging of the events, he separates the question of the violation of the honor of the Roman people from that of the correct understanding of the treaty. In respect to the latter, he has no doubt that the communities which came under the Roman protection later were also included in the agreement, "Quis

aequum censeret aut ob nulla quemquam merita in amicitiam recipi aut receptos in fidem non defendi?"

This, however, does not decide the present question. At best it may determine the norm for the inner relation of the Romans to their allies; but it can not decide the correct meaning of the contract. And this is the only question we are trying to solve.

This is a point in which people usually judge without method or at least without being aware of the method they follow. And yet it is also a case in which one must have a strong feeling of personal helplessness before a difficult problem. The person who feels it his duty to come to a responsible decision, will probably look for striking models in similar cases. But the possibility of recognizing whether a previous situation is parallel to the present one, requires a clear idea of the higher norm embracing the two similar modes of procedure, and involves a desire to clarify the general method that is followed in this investigation.

It is small consolation to give up the attempt on the pretext that it is essentially a question of the *art* of interpretation. For we must be careful to make a distinction here. The subsumption of a particular case under a methodical mode of procedure is indeed, if possible, an exercise of the art of legal judging. But the recognition of the principles under which an ambiguous contract must be classed in order that we may be able to interpret it *correctly* requires conceptual and systematic *knowledge*. The fundamental mode of procedure for finding out the right meaning of a transaction is a matter of teaching and learning. To realize it in a given case is the business of the art of application.

And as a matter of fact people have always sought for fundamental rules that might be used as general principles in doubtful questions of interpretation. The sources of Roman law offer a series of well-known sayings which seem

to have this purpose in view. In the title "De diversis regulis iuris antiqui" (L 17) alone are found about a dozen and a half such rules. But the universal form in which they appear is often deceptive, for in many cases they have been taken (in part this was already done by the compilers) out of their context, in which they were intended to apply merely to specific facts. Often too they refer to the peculiar treatment of "stipulationes" at that time (cf. D. XLV 1, 99); and their own meaning is also sometimes hard to understand and a matter of dispute, for example, "Veteribus placet pactionem obscuram vel ambiguum *venditori vel qui locavit* nocere, in quorum fuit potestate legem apertius conscribere" (D. II 14, 39).

An attempt has indeed been made in modern text books and also in statutory expressions to correct this defect. Propositions have been laid down such as the following: "In doubt decide in favor of the less burdensome"; or "in such a way that the declaration shall not be without effect"; or "against the one who made use of ambiguous expressions"; and so on. But so far as these suggestions have a determinate and unambiguous meaning, they suffer from a fault which can not be removed from them without resorting to external aid — they are put together without a principle. We find indeed in the German common law practice the occasional remark that the sayings of Roman law, to which reference was made before, are not based upon positive regulations, but are derived from "the nature of the thing," and hence must be observed even where the Roman law is no longer in force. But the proof of this statement is wanting, and the opposite is true as regards the citations from the Corpus Juris as well as the modern rules which we quoted. They are *accidental generalizations*, and are devoid of inner unity and objective connection with the idea of law.

The case is somewhat different with the definite legal prescriptions governing interpretation. Our Civil Code

knows these too, and refrains entirely from giving household remedies for the interpretation of legal transactions. These prescriptions are of three kinds, (a) Legal explanation of definite expressions in legal transactions, judicial orders and statutes; (b) prescriptions of interpretation extending to the entire legal relation, its origin or its termination; (c) a series of rules which determine, by the legal interpretation of doubtful private dispositions, the specific results of certain particular questions arising in an existing legal relation.

All these groups of interpretative prescriptions stand in contrast with the supplementary legal rules. The latter are employed when the private parties have been silent on the question in dispute; whereas the former are for the purpose of clarifying in a concrete case a doubtful will content. If a rule of law is intended to be a rule of interpretation only and not (or not at the same time also) a supplementary norm, it can not be applied if it is clear in some other way that the parties did not intend to provide for the point which the rule in question is meant to cover; for in that case what is needed is to complete an incomplete will and not to interpret a doubtful order. Thus informal negotiations may be used to make clear the meaning of a declaration in a formal legal transaction; and in this way a proposition which is merely a rule of interpretation loses its importance, but not a supplementary rule. This is especially true in insurance, when there is some doubtful point in the policy, which can be made clear by going back to the declaration preceding it. And in judicial procedure, the interpretation of a document that is agreed upon by the one who drew it up as well as his opponent binds as a rule the judge also. In such questions therefore a rule of interpretation loses its value, but a supplementary norm may still find application.

As said above, the function of these specific rules of interpretation must be judged differently from the at-

tempts mentioned above to lay down general rules as the result of experience or of legal command. The former constitute a definite technical aid in making clear in a given case what the legislator assumes in the average case to be the meaning of those who made the declaration. He prefers to give his order a fixed expression at the risk of missing the right thing in special cases. The advantage which decides him is that of technical certainty. So far this manner of aid is fundamentally clear and in itself well justified (cf. p. 196).

Whether this distinction between mere rules of interpretation and supplementary rules is to remain permanently is a question concerning the technical treatment of certain special points. That the distinction exists in our law as we outlined it above is not a matter of doubt. The origin of this may have been that it was felt desirable in a given situation to have a more definite point of support in the interpretation of legal transactions; and the proposition which proved its value in this way was then retained with the limitation that was placed upon it. But after having recognized the true state of affairs in the actual condition of our legal system, it is scarcely to be recommended that the above mentioned distinction should be maintained. For it is calculated to raise frequent doubts in which one of the two groups a certain proposition should be placed according to the intention of the law in force. Even apart from the doubt just mentioned, it is a difficult and complicated affair to carry it out in a given case. And the result of its technical application in practice is so vague and indefinite that we can not attach much importance to it. It would therefore serve the cause of simplicity and clearness if we assigned equally to every proposition that is not absolutely necessary the two functions of interpretation and supplementation. But this belongs to the details of technical legal science.

In following the last course of discussion we digressed from the proper direction; and we followed it a certain distance only in order definitely to confirm this conviction. Let us now return to the point where we started and the problem we there set up. We find that it was proved there that we can not, by means of concrete particular propositions having to do with a conditional legal content, arrive at a standard and fixed method of interpretation of contracts. Here too it is necessary to have in view the whole. A certain contract must have its uncertainties made clear. What is thus determined must be taken up by the law and carried out in practice. And what has thus been recognized by it must be in agreement with the fundamental idea of legal system, namely, the endeavor to realize justice by compulsion. *The work of interpretation must strive after a result that is "just in content."*

And this is also well expressed in the Code, "Contracts are to be interpreted as *good faith* and due regard to commercial usage require" (157). This principle would be self-evident even if it had not found this form of expression in the law. For since it is established that where there is no doubt about the terms of an unjust agreement, it has no support in the law and, falling beyond the limits of freedom of contract, is void, it follows that where there is a doubt about the meaning of a definite item of a contract, the only proper solution is that which is in harmony with the principles of just law.

For this reason this legal precept must be obeyed not only in the sphere of civil law but also in that of public law. And it must be followed in relations between individuals as well as in treaties between the States of the Empire and in the interpretation of international treaties. And in the Civil Code the principle mentioned should embrace not merely the sphere that is subject to the imperial Code, but also the provincial law. For we are not

dealing here with a rule which is valid in the sense of a technically formulated paragraph, but with a proposition teaching the following principle, that *in interpreting contracts we must bear in mind that the particular legal transaction must be in harmony with the fundamental idea of law in general*.

Prussian law is right when it expresses this idea in reference to the interpretation of laws as well as that of privileges: "Besides, all such specific laws and ordinances must be examined so as to agree with the prescriptions of the common law and *the main purpose of the State*" (ALR. Introd. 57).

On the other hand, it results from our theory that an offence against the principle recognized by the Code is a violation of the *law*. An interpretation which fails to hit the result required by "good faith" is not in opposition to "morality" but to *positive law*, namely, to that which desires its content in a given case to be determined in accordance with the idea of just law. According to our law of procedure, therefore, revision should be granted in case of offence against BGB. 157 (cf. above p. 303).

All these discussions are in the nature of introduction. It is time to take up the heart of the problems. Here also the highest aim at which we must direct our attention in cases of doubt is the idea of just law. If we wish to follow this proposition adequately in our endeavor to determine the right meaning of a transaction, we must investigate to some extent the problem of interpretation itself. Our present problem is to show the right method of treating questions of interpretation. It would be impossible, indeed, to undertake an analysis of all the questions which necessarily arise in the interpretation of legal transactions. And on the other hand, we must be careful in the present stage of our study not to lose ourselves in particular technical questions, but really to offer *methodical* instruction.

§ 2. *The "actual" will.* — The ordinary distinction which the traditional theory of interpretation attempted to work out was based upon the difference between "grammatical" and "logical" interpretation. In the first place, we are told, we must attend to the "meaning of the words." By this was meant the ideas which, according to linguistic rules, lie in the expressions chosen by the person who made the declaration. Following upon this aid are other elements which help to make clear ambiguity in speech, as for example the specific situation in which the declaration was made. To be sure, many lawyers thought that even where the words are *not* doubtful it still remains a problem to find the real will of the person who made the declaration. But naturally this must not be decided merely according to probability; and the words of the declaration must always cover the actual will. We must also pay due regard to the manner in which the opposing party may understand the declaration from his point of view; and so on.

It may be safely assumed that this uncritical tradition goes back to the vague general sayings of the Roman lawyers. In practice the latter do indeed offer excellent examples of true and objective interpretations of declarations of will. We shall make use of a few later. But in formulating their ideas on the method thus followed they are less happy. In well-known sayings usually collected in textbooks on the Pandects, they say often that where the meaning of the words of a declaration is clear, all other consideration must be cut off. Thus Paulus says, "*Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*" (D. XXXII, 25, 1). Similarly Marcellus, "*Non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testatorem*" (ib. 69 pr.). And in a very peculiar way Gaius says, "*In his, quae extra testamentum incurrerent, possunt res ex bono et aequo interpretationem capere:*

ea vero, quae ex ipso testamento orerentur, necesse est secundum scripti iuris rationem expediri" (D. XXXV 1, 16). And an interpretation according to "benignitas," "humanitas," "aequitas" is allowed dogmatically as a rule only "in rebus dubiis."

This, as it seems, was used mechanically in the middle ages and it was received the same way into Germany. The struggle of many teachers of the Law of Nature against this tradition was not successful. The proposition, "Verba menti subordinanda," as Thomasius formulated it, was too indefinite. We must see to it that by changing the method of studying this matter we may obtain a clearer and more certain theory.

Now the dividing line, which must first be explained in purely logical fashion, is not that between the "verbal" and the "real" meaning of a declaration, but between a volition *determined subjectively*, and one that is *objectively justified*. These two points must be applied in the order indicated. For the point is to see that certain legal consequences should attach to the declaration of will as determined by the meaning of the latter. Hence the first problem to solve is, What is it that the declaring subject intended?

For the answer of this question there are only some maxims representing the wisdom of specific experience. It is a problem by itself in every case. In working it out, language — the general or specific mode of expression of the parties concerned — comes in, no doubt, for its share. Furthermore due regard must be had to commercial usage and conventional custom; and we must use also the concrete aids of the specific situation. It is a question of evidence, and stands on the same level as, for example, the question whether a given defendant actually committed an act charged against him or not. In this first problem of interpretation, therefore, the matter always turns about the determination of an actual will content

as represented by the declaration in question. What is to be done with this will content when determined is a different matter. The question first is whether he intended to form a combination with others. And above all the question remains open whether the subjective will of the declaration as thus determined is within the limits of freedom of contract.

But if the content of a declaration of will is not clear, we must assume that it is objectively just. We have no right to impute to a person an unjust will and declaration. Therefore if we do not know this for certain, the concrete content of the declaration in its doubtful point must be interpreted in such a way that it will agree with the principles of just law.

In this sense it can be said indeed that the declaration is hypostatized by the law. It now denotes a legal content independent of the person of its author. Its meaning can therefore very well, in the specific case, be judged according to objective principles. And this latter method must be carried out, for example, even if the author of the declaration is alive and on the spot and perhaps has an opinion of his own concerning the content of his formal declaration, against which opinion we must now, for the reasons above mentioned, decide.

In this investigation of the subjective will and the objectively justified content, the steps in the interpretation of a declaration of will must be taken in succession. We must first try to determine the first in order to judge it further according to other laws. But if it can not be made clear in its own peculiar quality — and this happens again and again in any number of cases — then we must turn to the determination of the second point, namely, to that which, in the specific situation, is objectively just. The emphasis must therefore be laid upon the *real difference* in the character of the will content and not (as if that was fundamental) upon the *means* of the work of interpreta-

tion. This is the reason why our differentiation is conceptually different from the traditional assumption of a verbal and a real interpretation.

In the first place it is clear that "words" and "expressions" are merely accidental means for conveying a definite will content. The practice of our courts is always overburdened with the problem of interpreting in an articulate manner silent declarations of will made by means of gestures and other acts. And the Supreme Court of the Empire had recently to "interpret" in an objective manner a "dash" which one had drawn in answer to a question in an application for insurance. The technical difficulty created by recent legislation in requiring "express" declarations in many legal transactions (RGes. 5. VI. 96, 2; BGB. 700) need not be discussed here.

Above all, however, it would not be right to consider the expressions and the words in every case as the less important and the real meaning as the more valuable result. There may be a case in which the matter is reversed. "An emperor's word must not be turned and twisted." But the women of Weinsberg clung "to the literal meaning of the expression," splitting hairs, and did not find the "real will" of the emperor, which he changed as an act of grace in order to attain the aim of reconciliation and real goodness. There are therefore two different classifications; on the one hand "grammatical" and "logical," on the other, *subjective* and *objective*. According to our point of view the first question of the work of interpretation concerns the second classification. This is not opposed to the determination of the Civil Code in 133. We have just quoted the significant words of this paragraph in connection with the example above. Now it is true that the paragraph gives us an incomplete and altogether isolated rule. Nevertheless in the instruction it aims to give for the interpretation of a declaration of will it hits upon the right method. For the

verbal expression of a declaration, with its "literal sense," is *one* of the various means available for understanding and indicating a certain intention. This latter is the important thing when we speak of the "actual" intention. *For it is this that must be recognized and realized by the law.* Therefore there is not the slightest ground for submitting to that *one instrument* as if it were the decisive judge, whereas it is only a *means*, and only one out of many.

The truth is therefore that we must "find the actual intention," whatever means may have to be used for the purpose. And now the investigator comes to a point where he has to say that *it is "doubtful" what the "subjective" will content was.* It may have been this, it may have been that. In this case, as we explained before, the meaning of the declaration to be looked for is that which, in this situation, would be *objectively just*. That is objectively just which, in the typical community embracing in thought the author of the declaration and the person addressed, corresponds to the principles of just law. Instead of going through the exposition again, I give a few examples in the sequel in the order of our principles.

1. Principles of *Respect*. In a business inquiry the person addressed said in his reply, "I am not opposed . . . and would suggest, . . ." The question now is whether this is to be considered as a definite offer. The correct answer here is the negative. For we can see no reason in this case why, in the typical community which lies in the *negotiations*, the one party should be more stringently bound than the other. The matter is so far, therefore, in the stage of preparation.

In bequests a doubt may easily arise how far, in the meaning of the terms, the obligation of the obligor extends. Thus a person declared, "I bequeath after my death my shares" in two buildings according to designa-

tion. At the time he wrote this he possessed a third part in each of the houses, but later he added another sixth part in each. The proper solution here is that the obligor need surrender only the former shares and not the additional (cf. BGB. 2164). A bequest is a free gift, and creates a unilateral obligation only. Now the idea of adjusting a community of interests carries with it the principle that unilateral burdens must not be extended further than is required by a positive ground (cf. D. L 17, 9; ib. 56).

In an old bill of debt the debtor promised to pay "to any one who had bona fide possession" of the bill. Without proving that it had been transferred to him a person in possession of the note demanded payment. The claim should be rejected on the same grounds as above.

2. Principles of *Participation*. "In these days," Marcellus relates, "many discussions were held in the imperial council concerning bequests. A person struck out the names of the heirs in his testament. The State treasury laid claim to the inheritance. The beneficiaries claimed their legacies. Among them were also found some of the heirs whose succession had been cancelled by the testator in the document. The lawyers disagreed in their opinions. Antoninus Pius had the case tried before him and decided it himself." The report of the case reads as follows (D. XXVIII 4, 3): "*Cum Valerius Nepos mutata voluntate et inciderit testamentum suum et heredum nomina induxerit, hereditas eius secundum divi patris mei constitutionem ad eos qui scripti fuerint pertinere non videtur, et advocatis fisci dixit: Vos habetis iudices vestros. Vibius Zeno dixit: Rogo domine imperator, audias me patienter: de legatis quid statues? Antoninus Caesar dixit: Videtur tibi voluisse testamentum valere, qui nomina heredum induxit? Cornelius Priscianus advocatus Leonis dixit: Nomina heredum tantum induxit. Calpurnius Longinus advocatus fisci dixit: Non potest ullum testamentum valere,*

quod heredem non habet. Priscianus dixit: *Manumisit quosdam et legata dedit.* Antoninus Caesar remotis omnibus cum deliberasset et admitti rursus eodem iussisset, dixit: *Causa praesens admittere videtur humaniorem interpretationem, ut ea dumtaxat existimemus Nepotem irrita esse voluisse, quae induxit.* Nomen servi, quem liberum esse iusserat, induxit. Antoninus rescripsit liberum eum nihilo minus fore: quod videlicet favore constituit libertatis."

According to our modern civil law this case would be decided very simply according to BGB. 2161 in combination with 2084. According to Roman law there was more reason for abolishing the bequests. And as a fact the course of the plaintiff Leo, the one legatee, was clearly in a bad position, until his clever counsel introduced the question of "manumissio" into the debate. We can imagine, in this legal drama, what impression this reply made upon the emperor; and there was no need of the somewhat hard epilogue of Marcellus. The lot of those who were arbitrarily excluded from the social community; who had the form and nature of human beings but were treated legally as things; who had only duties in the social economy but no rights — their lot weighed heavily upon every thoughtful and considerate person of those days. And therefore when there was a doubt in the meaning of a declaration, that result was chosen which would ameliorate and rectify the evil in the given case. Thus the matter that decided in the above case was neither "grammatical" nor "logical" consideration. There was in fact no methodical investigation at all. And yet Antoninus Pius hit the right method in his judgment when in his uncertainty concerning the *subjective* intention, he decided in favor of the *objectively just* as the content of the volition in question.

A person instituted his five children as heirs. He provided in his will that if one of his sons, who was mentally disordered, should die unmarried, his share should be

equally divided among "the other children of the testator." The testator died and was survived by all his children. After a number of years the mentally disordered son died unmarried, having been preceded in death by three of his brothers and sisters who left issue. The only surviving brother claimed the entire share for himself, whereas the children of his brothers and sisters claimed to succeed to the place of their fathers. The courts disagreed in their opinions. The supreme court favored interpreting the will in the interest of the sole surviving brother as the only one entitled. This was certainly unjust. Since the personal meaning of the testator himself is doubtful, his testamentary declaration must be so interpreted that the result will be objectively just. But this would certainly mean in this case to assign the share in accordance with the law of succession as stated in the Code (BGB. 1924, 3). According to the spirit of our law of succession the issue of descendants are in the same concentric circle as the surviving descendants (p. 221). It is permitted indeed for a testator to exclude certain persons, and the exclusion is limited only by the technical rules concerning rights of compulsory portion. Nevertheless it is in reality abnormal and the result of a subjective and arbitrary will. Hence there is not the slightest ground for assuming it where the personal intention is "actually" doubtful. Rather should the interpreter of a last will and testament interpret its content in the spirit of justice.

This may be observed in testamentary dispositions in various forms. It has been employed in the interpretation of a document establishing a family "fidei-commisum" in which the order of the founder concerning the succession seemed doubtful. In a testament the testator, "passing over the relatives of a distant degree on the mother's side," instituted as his heirs "the *hereinafter named* relatives on the father's side, namely, the descendants of the brothers and sisters of his father. But," the testa-

ment continued, "as all their names are not known to me, I designate only the families, as follows . . ." One family was left unmentioned. But the courts properly decided (the reasons will be found in our above discussion) that it must not be inferred from this that the testator intended to exclude the omitted name.

This view receives a certain confirmation from the following case reported by Paulus (D. XXXVI 1, 76 [74], 1): Fabius Antoninus left two minor children, Antoninus and Honorata. He disinherited them in a valid manner and instituted his wife as the sole heiress. But she was directed to give the daughter Honorata three hundred in cash and a few things that were designated; and to the son she was to surrender the whole inheritance — "*cum ad annum vicesimum aetatis pervenisset: quod si ante annum vicesimum decessisset filius, eam hereditatem Honoratae restitui praecepit.*" The widow succeeded to the inheritance and died after a time. According to law she was inherited by both children. Then the son Antoninus died, after having completed his nineteenth year and entered upon his twentieth. He left a daughter Fabia Valeriana as heiress in very needy circumstances. There now arose a dispute between the latter and Honorata, who desired the inheritance of the old Fabius Antoninus, in accordance with his testament, for herself. The emperor considered that the meaning of the testament on the point in question was doubtful. Moreover the expression here used is differently understood in the laws also. Thus in declining a guardianship on account of being seventy years old, one must have entered upon the seventy-first year. On the other hand the case is different in the prescriptions of the "*lex Aelia Sentia*" and other laws. Accordingly he decided, "*aequitate rei motus,*" against Honorata, in favor of the daughter of the son. If we ask what was the ground of this "fair" decision, we shall find it is no other than the idea mentioned above

that where it is equally possible to understand the declaration in favor of the plaintiff or the defendant, that party must take precedence who, according to the system of the concentric circles, is nearest. And this was in this question of *compensation* the needy daughter and not the sister.

The provision is frequently found in wills that the surviving spouse is free to administer and use the property left by the deceased as he or she sees fit. Now the question has been raised whether this freedom extends also to claims arising from the management of the estate brought by the wife into the marriage. The answer must here be negative. The first disposition carries with it the right of excluding legal heirs at will. The positive law permits it. But when it is doubtful how far the exclusion should be carried out, we must decide in favor of less exclusion and interpret the result in accordance with objective justice and in favor of the heirs who are at the time excluded. The idea is therefore essentially the same whether we are dealing with near relatives or strangers appointed as heirs in the testament. And it may be carried out the more simply in our specific case because the surviving spouse had no reversionary right at all to exemption from claims which originated against him previously.

§ 3. "*Intelligent*" estimate of the case. — We must now harmonize our result with the doctrine of the effect of error on a transaction. We refer to the well-known determination of BGB. 119, according to which a person is entitled to contest his declaration "if it is to be assumed that he would not have made it if he had known the facts and *had considered the matter advisedly*." We assume therefore in every case a distinction between the actual content of the declaration and that which the author intended. How can there be such a distinction in view of the result obtained by interpretation?

Two things are possible.

1. The difference may arise through an external error in the declaration, as for example through a slip in speech or in writing (but not through an error in calculation and a consequent offer at a disadvantageous price), or through incorrect communication of the same by the person or company employed for the purpose.

2. It may turn out later that the objectively justified content of the declaration as determined by interpretation does not correspond to the personal meaning of the one who made it.

Both cases, therefore, have this in common, that there appears now a personal intention of the declarant which was not apparent and was not known at the time when the declaration was made. But when we carry them out to their consequences we find that there is a difference between them in their bearing on the problems we have taken up.

1. The first possibility offers no difficulty in the present discussion. The *actual* intention of the declarant must be established, and we must use the method indicated above as the *first* problem in the interpretation of a declaration. The peculiarity of the present situation is merely this, that the determination of the intention does not take place until later, when the declaration in its original appearance has already become legally important. The only thing that remains then is to contest it and set it aside. Interpretation, therefore, as explained above must be undertaken in every case. The difference is merely this, that in the cases considered above the actual intention of the declarant when discovered begins to be effective for the first time, and has a free field to do so. Any further decisions must be considered after the result of the interpretation has come to light. In the present question, on the other hand, the actual intention as now discovered finds the legal consequences of a declaration

already in occupation of the field — a declaration which proceeded from him, but the intention of which does not agree with his own. Then the question to be decided is whether the results of the original declaration should be set aside.

As long as the will of the subject has an open course before it, and the legal effects are still to follow, the only thing to be looked into at first is, simply the *subjective intention* as it was, and for the reason that it was his intention. It may be that his real intention may be established by a consideration of what would have been a *just* endeavor in those circumstances; but the ground for this consideration lies in the fact that the content of the declaration as thus determined corresponds to the *personal will* of the declarant. But if the declaration has already given rise to important legal consequences, even if it be no more than the confidence of third persons in the declaration (a result recognized by the law as influential), then according to the determination of the above norms the decision can not be determined exclusively by the *personal intention*, which was not in agreement with the content of the declaration. Formerly its mere existence would have caused the law willingly to recognize the legal results desired by it. This ability the subjective volition has now lost. For now it is first necessary to reverse the legal results which followed from the declaration itself. And for this purpose he who desires it must further show that the intention which differs from the declaration is *objectively just*, and deserves, on *objective grounds*, the preference over those legal effects of the declaration.

This is what is meant in the Civil Code by the expression, "considered the case advisedly," which is introduced as a condition of the right to contest the declaration. This is not required in testamentary dispositions. Here the actual last will of the testator as it can be shown

to have been, and without any regard to the objective justice of its dictation, has the deciding voice even as against a previous result (BGB. 2078; the converse, however, is true in conclusion of marriage, 1332 ff.).

2. In the second case of those above mentioned there arises a formidable complication. Here the content of the declaration is found by interpretation to be objectively just and in accordance with the principles of just law. To this is opposed the actual will of the declarant, as now discovered, — the will, which (as has just been said) can carry out its intention only if it is the result of an “intelligent consideration of the case,” *i.e.* if it is an *objectively justified* volition. How is it possible that such an opposition may arise?

The explanation lies in the fact that the one is considered from the standpoint of the party *receiving* the declaration, and the other from the standpoint of the one making it. And the possibility of opposition arises from the fact that for the last mentioned party the material to be considered subsequently increases. For we are dealing in every case only with *objective* justice of a will content and not with *absolute* justice, which never allows of progress and improvement. Objective justification in a given case means the agreement of the material so far as known with the principles of just law, understood by the person addressed in that sense. But the same thing is true here as everywhere else, where there is objectively just thinking and willing, namely, that it is subject to improvement. And thus it may happen that on the side of the declarant the material is supplemented by additional elements, and is corrected in the spirit of true principles. Till now the former part alone was visible and the acceptance of the receiver was objectively justified. Now we come again to the author of the declaration and from his point of view, where more facts are visible, and on the basis of the declarant's contest, we once more “consider the case

advisedly." And it is possible that the results must follow as determined in the opposition.

In testamentary dispositions a will may be contested in case of error without regard to objective grounds; and hence what was said above applies principally to offer and acceptance in contracts. There is a great deal of material here from the time of the *Corpus Juris*. And the method just described may be applied to it without much difficulty.

An interesting question has been raised recently, Whether a person who has made an error is justified in contesting his declaration when the other party declares himself ready to fulfil the contract in accordance with the actual intention of the declarant. For example an invalid orders by mistake sherry instead of port, which his physician prescribed. When the mistake appears, the wine merchant is ready to deliver port instead of sherry. The case was found difficult to decide. The right to contest the declaration can not be denied according to BGB. 119. And yet this would go against the "feeling of right" or "commercial needs" or "justice." For the laws were not given "for the sake of a formal logical principle, but to serve the interests of human intercourse." All this tends to a *just* result; but is surely not sufficient to enable us to find or to justify it. But there is no doubt that this result follows from the general principle of *just law* and its application here in the expression "intelligent consideration of the case." It is wrong to suppose that BGB. 119 allows the person who made a mistake in his order to contest it simply because he wants to set it aside. He can contest it only when his actual intention in contradistinction to the declaration aims at an objectively just result. Apart from this he is bound by his declaration. He can set it aside if he puts something better in its place. But he does not do this if he wishes to treat the other party in accordance with his own personal and arbitrary desire

and against the principles of just law. Hence if he wishes to contest his erroneous declaration and set it aside, he may do so only by putting such a real will in its place as — “in accordance with an intelligent consideration of the case” — corresponds to *just law*. The Code allows a declaration to be contested in case of error, only when the actual intention taking the place of the erroneous declaration brings about an objectively just result.

§ 4. “*Bona fide*” interpretation. — We now pass to the interpretation of contracts. Here the first question to be considered is, whether a *consensus* of the negotiating parties has taken place. This requirement is necessary in addition to the separate declarations of the two parties; or in other words, the will contents expressed in the declaration of the two parties must be identical. If this element of consensus is wanting, then according to the traditional theory, which is still prevalent, the contract has not taken place.

In view of our previous discussions the absence of consensus may be due to two causes. It may be the result of *interpretation* of the two expressions or of the *contesting* of one of them. All we have to do therefore is to make use of the result of our previous deductions. Every expression must first be made clear as to its meaning, or established after it has been contested. And then we have to see whether the declarations on the two sides can be made to coincide. After all this is done we may point to the fact in a particular case that it is possible that both parties may have made a verbally similar declaration which does not correspond to the content of their will. This has been specially provided for in the Saxon Code, 809, in the following proposition. “If the words of a contract are clear, we must accept the meaning which they convey, except if it can be shown that all those concerned in the contract understood the words in a different way.” So far as the law actually in force is concerned

this is self-evident, as can be seen from our previous deductions.

But on the other hand the will on both sides must aim to effect an agreement. According to the old Commercial Code (123 : 4) a trading partnership with full liability was dissolved "by the mutual agreement" of the partners. Hence if each one of the partners brought an action at the same time against the other for dissolution, the court sometimes placed it under the law just mentioned. This was unjust according to the point of view here adopted. The question may come up, according to our present Civil Code, in the case of a partnership *formed for a fixed time*, if each partner brings an action for dissolution on "valid grounds" (BGB. 723).

When the preliminary question has been decided in the affirmative, namely, that there is an agreement among the negotiating parties, begins the work of interpretation in contracts; for which the Civil Code, 157, gives the instruction discussed above (p. 392). It does not seem to have been always observed that this requirement of the law must be acted upon only when there is a *particular point* among the provisions of the contract that has remained *in doubt*. This necessary condition of the law may manifest itself in two ways.

1. There may be a doubt and a difference of opinion on the question of agreement. This doubt may concern a particular consequence of the contract. And the two declarations give us no certain information on the matter. The possibilities are therefore either that there was an agreement, only *we do not know it*; or that it is *doubtful* whether on this specific point there was an agreement in the contract at all. In this case we must decide the meaning of the contract on this disputed point to be what is required by "good faith." And it turns out that the question of the *meaning of the contract* on a doubtful point, is the same as that which would be dictated by the *prin-*

ciples of just law in a similar case of dispute. For here also we have another instance of the principle that the contract exists only as objectified, and must be carried out consistently with its own intention in an objective spirit. Cicero is correct when he teaches in "De Officiis," "Fides est iustitia in rebus creditis." This can become externally the more clear because such a contract as an objective norm may become directly binding upon third persons also; as for example in all cases of universal or particular succession, entrance into relations of lease or rent (BGB. 571; 1056), pleas against claims concerning tangible objects, and so on.

2. The result of the first investigation may be that there has been no agreement. There is no uncertainty as to the content of the contract, but it is certain that on the point in question there was no agreement. Then the double question arises, whether the contract as such may still exist, and, if so, how is the given defect to be remedied?

In the sequel we shall first discuss 1. The problems of 2 will occupy us in the concluding number of this section.

The problem here is, as can be easily surmised, similar to that which occupied our attention when we treated of "bona fide" performance (BGB. 242). The present requirement, however, differs in several important respects. The former had to do merely with the fulfilment of an obligation; the present has to do with all possible results of a contract; not only its execution and fulfilment, but perhaps its beginning and end as well. On the other hand, we are dealing here with contracts, whereas in the other place we were concerned with all kinds of obligations, including such as arise from unilateral transactions, from law or crime. And yet again BGB. 157 may be applied even if the contract is a so-called "abstract" one; and hence, in particular, the promise (BGB. 780) and acknowledgment (BGB. 781) of an obligation must also

come under the general method of interpretation of contracts. Finally, in the question of "bona fide" performance it is established beforehand what has to be performed; to which there is added a circumstance exerting influence and change upon it. Whereas in "bona fide" interpretation it is uncertain from the start as to the very point in question, what is to be regarded as the intention of the contract; and this uncertainty must be removed according to the principles of just law.

This last is of special importance in the question of the measure of an obligatory performance. In the present case the meaning of the contract is *doubtful*, and therefore must be determined by means of "bona fide" interpretation. The court must then, in accordance with the broad instructions of 157, bring out as far as possible the objectively just value of the consideration of the one party, and measure the obligation accordingly, which is then to be taken as the meaning of the contract. In the former question we were dealing with the problem of *carrying out* an obligatory performance, the meaning of which was clearly established and within the limits of freedom of contract (p. 335). The doubt arose from the fact that by reason of important changes in the circumstances, to carry out the original performance in the matter of quantity strictly may seem *unjust*. In this case the court, in accordance with the narrower regulation of 242, must confine its decision to the authorization of a change (p. 276).

In this connection it is always presupposed that the indeterminateness of the performance was not contained as such in the meaning of the contract. For in that case we apply neither 157 nor 242, but 315-319 of the Code. There was no occasion for the difficulties made in the following case by reason of the first two paragraphs. In a contract for the assignment of a domain it was stipulated that the daughter of the party making the assignment

should receive on her wedding a marriage portion from the party receiving. The daughter was then one year old and twenty years later she was married. Here (according to the expression of the Civil Code) it is not a question of interpretation or "bona fide" performance, but of a determination according to "equity"; that is, the special application which is made necessary by the indefiniteness of the performance, must be carried out in accordance with the principles of just law (p. 291). But where interpretation is in order in accordance with BGB. 157, the additional expression "with due regard to commercial usage" which occurs in the paragraph is of no importance (p. 256). It was thought that this expression may possibly be an intensification of the "bona fide" rule in the interpretation of contracts. But this is not the correct relation of the two concepts. I read in a stimulating practical exposition the following example. In the horse market at X. it is the business custom that the seller should inform the buyer if the horse is moon-blind. If such information is not given, the inference is that the animal does not possess the defect in question, and it is equivalent to a warranty to that effect. Now if the buyer demands an indemnity for non-fulfilment of this sale, and the seller points out that there was no warranty of any kind, the buyer may oppose BGB. 157 to the seller's claim.

This is no doubt a just decision. But the "commercial usage" which lies at the basis is a constituent part of the *matter in judgment* and not of the *method of treatment*, as designated by the words "good faith." It is clear that the latter alone without the material to be judged can do nothing, as was shown in detail before (p. 171). But the Code could have added some other expressions besides "commercial usage," such as, "with due regard to linguistic usage," or "with due regard to the competent knowledge of the parties", or "with due regard to the state of the technical arts," and many other such considerations.

And in doing this it would have said nothing more, so far as the *aim and method of a right interpretation* are concerned, than that the interpreter must carefully observe the material he is considering and not leave any pertinent factor out of account. But the material under treatment, even if it be "commercial usage," does not by any means indicate the *fundamental method* of treatment. We shall now, in concluding this investigation, add a few illustrative sentences and opinions in the order of our principles.

I. Principles of *respect* — (a) of *existence*. — In mortgaging a document of debt, the mortgagor added the following declaration, "as security for all claims that the bank has, or may in future have, against him." Then the bank acquired, by assignment, a claim against the mortgagor. Now the declaration above mentioned may be understood without limitation, or it may be taken to cover only the credit granted by the bank itself. The lower courts favored the first mode of interpretation, the supreme court, with more justice, adopted the second. For the first would extend the binding character of a mortgage beyond the circle of the relations existing here in the special community with its specific mode of co-operation. Presumption speaks against this going beyond the obligations recognized in the model, for it is the first step in the direction of subjecting the content of a legal volition to the personal use of another.

A similar point of view leads to a negative decision in the following case. An engineer was engaged by an iron foundry and machine factory for office work and travel. In addition to his salary he was to receive $\frac{1}{2}$ per cent commission on the sales of the manufactures. This, when correctly interpreted means that he was to receive commission on the sales "which were made through his activity," not on all the sales of the entire establishment, including the various branch firms.

In another case a commission was promised for "securing a customer," four per cent of the business thus procured. And the promise was carried out. Subsequently the firm thus secured as a customer was dissolved; its assets and liabilities were transferred to another company. And the courts decided (with justice as we proved before) that the agent had no claim for commission on the business done with this new firm.

The case is different in the following agreement, "All objects of value which *remain* in my possession to your account . . . , whether the result of business commission or other relations, are to serve as security for all claims." Here the question arose whether the terms included securities submitted to obtain new coupon sheets; because these were not intended to *remain* there. The Supreme Court of the Empire justly decided in the affirmative. For this is the objective way of carrying out the business understanding; whereas the doubtful word in question signifies nothing more than the *technical* prerequisite for pledge, namely, securing possession of the valuable object in question.

In the bankruptcy of a public company an agreement was made by which the creditors were to receive twenty-five per cent of their claims. Later the question arose whether a given creditor can lay claim to this share if the debtor has counter-claims to set off against him. The agreement itself had no provision on this point. The court justly decided the meaning of the agreement to be this: that the creditors were satisfied with twenty-five per cent of that amount of their claims against the common debtor which remained after an adjustment of the assets and liabilities on either side. Otherwise the creditor would have renounced his claim for the most part unconditionally, and yet be under further obligation to the common debtor. But there is no specific reason for this; it would lead to a subjective, one-sided and arbitrary

treatment of the one party, namely, the creditor who is entitled to his claim.

In a recent judicial decision is found the following statement. The declaration of the defendant that "he would not claim his capital as long as the plaintiff was the owner of the mortgaged land," must not be taken with strict literalness. The defendant did not mean to renounce all right of terminating the mortgage during the ownership of the plaintiff. His promise evidently meant simply that as long as the plaintiff regularly paid his interest on the loan, he (the defendant) would not ask for the return of the capital. The plaintiff himself could not have understood the declaration differently, for it was a question of a considerable amount of interest which the defendant supposedly needed to fulfil his own obligations. Moreover in case of a sheriff's sale he might easily lose all the money that was more than two years due. This view of the court is in general correct. Putting it in its systematic connection as given here, we give it a deeper justification. The benefit which the creditor conferred would change into a completely arbitrary desire on the part of the debtor if in the point in question we paid regard to him only and not also, in an objective manner, to the party of the creditor. Accordingly in the action just named the claim of the debtor offended against the principle of respect to be observed here, and was therefore justly rejected.

A person was insured against hail in a mutual insurance company. He wanted to withdraw and gave them notice to that effect by sending a telegram, the original copy of which was signed by him, and which was delivered promptly and in correct form to the directors of the company. Nevertheless the latter refused to accept the communication as a proper notice; because in the conditions governing insurance was written that notice of withdrawal must be given "by means of a registered letter addressed

to the directors." The first judge favored this view of the company; the supreme court rejected it, and justly so. Objectively speaking the interests of both parties were completely protected by the procedure of the party giving notice. To take a particular *means* to the desired end and make of it an end in itself has no sense. As long as the desired end was objectively attained in a manner completely satisfactory to both parties concerned, it seems subjective and arbitrary to hark back again to the fact that an error was made in the use of the means leading to the end. The specific means that was in question here was only one of many possible means, and had not at all the quality of a sole and necessary condition. If the agreement of the parties prescribed that particular means, it was merely an indication that the notice must come in good time and order. As long as this was realized, every thing was attained in the right spirit of the contract, and to insist on the irregularity of the ways and means employed would be to violate just law.

It is often of interest to know whether there is a condition subsequent or precedent in a contractual agreement. In the purchase of a machine for binding sheaves the condition was added that the seller must take it back if it could not run on the hilly ground of the buyer's estate. We must go about methodically in this way. If the condition is precedent, we consider only the interests of the buyer, and all burdens, efforts and costs are put on the side of the seller, who has to pack up the machine and take it away at his own cost and at his own risk. If the condition is *subsequent*, the interests of both parties must be considered and adjusted equally. No special demand is made on the buyer, for he is not yet finally under obligation. The seller is given the advantage of a firm legal relation, so that he does not appear merely as an object of the other's subjective will. Therefore it follows that the second interpretation of the doubtful contract

corresponds to the first principle of respect which we are here considering.

In another case of a similar nature the agreement was that the buyer need not pay the price of the stones he bought until he has received his claim for them from the owner for whose building the stones were ordered, and until he has been paid for the mason's work done at the same time. Here the question is whether this must be considered as a condition precedent or as a determination of time in accordance with fairness. In the first case the seller would be completely at the mercy of the other party. He would have to wait until the owner chose to make payment, or until the buyer made up his mind to notify the owner and enforce payment. Under the second supposition the interests of both parties concerned are objectively covered. Depending upon the kind of structure that is being built we can easily determine objectively upon a period of time within which such a work is usually completed. Here the seller gets his firm right, and the buyer is allowed an appropriate length of time for making payment. The second alone conforms to just law, and must accordingly be taken to be the meaning of the doubtful agreement.

Another variation is found in the following case of the sale of an estate: "The seller reserved the right of support and occupancy of a portion of the estate for himself and his wife *during the lifetime of both*. . . ." Then the wife died, and the survivor claimed a right of survivorship for the unperformed acts. This should have been justly denied. For there were two distinct claims; and in each case the objective purpose was based upon personally defined performances in favor of the persons of those who made over their property. If one person dies, the rights of this person come to an end at the same time unless there are specific legal reasons to the contrary. As there were no such reasons in this case, the

demand of the survivor had no objective basis and appeared as an arbitrary claim on those who took over the property and were under obligation hitherto.

1. Principles of *respect* — (b) of *execution*.

A music teacher, on being appointed to a position in a conservatory, promised that he "would carry out his contract faithfully," under penalty of a fine of one thousand marks. When the matter came before the court later, it justly decided that the fine is not to be imposed for every violation of any particular item in the contract, but that this penalty shall be reserved for a *breach of faith*. We should say the reason is because otherwise there would be a violation of the principle above cited, in carrying out the idea of the model community.

We must understand in a similar sense such declarations as "at the earliest convenience"; "at any time" (when the person entitled appears after many long years); for "good" or "best" goods; for securing a "first-class salesman," and so on. The "circa" clauses of merchants must also be interpreted with some measure of freedom, with due regard to the interests of both parties concerned, as said before. The case is somewhat more doubtful in the sale of "remnants," which are found not to contain the approximate quantity named by the seller. Many courts have assumed that the seller is not responsible for the quantity at all, that at most, if the two parties had previous business connections, the seller is to be held to his promise concerning the *quality* of the goods. It would be more just to consider it from the same point of view as that mentioned before. Otherwise the buyer is left in complete uncertainty and dependence with regard to the *amount* of the goods delivered; he must be satisfied if he gets a very small fraction of the goods as a "remnant," and can not realize his objective desire. According to our conception the seller has no other demand made upon him except that before the buyer is put under obligation, he

(the seller) shall indicate more precisely the amount of the remnant.

The owner of a bath house at the seashore bought a strip of land along the strand in order to enlarge his establishment. A landing pier was attached to the strip of land belonging to the admiralty, from whom the land was bought. After making the land over to the buyer, they refused to remove the pier, and began to employ it for other purposes. There was nothing said in the contract, they claimed, about removing the bridge. The buyer, on the other hand, argues that this was regarded by both sides as self-evident and was intended in the agreement. The way to determine with certainty the *right* meaning of the contract is to introduce the idea of the special community. This community, as a model of just law, appears here with the purpose of acquiring the strip of land in return for the price paid for it. The purposes of the two parties must be mentally united and carried out in common; and the adjustment of their respective interests must take place in accordance with this idea. From these two considerations it follows that the procedure of the sellers is illegitimate according to the idea and the principles of just law. For by leaving the pier in its place and using it in the interest of one party those purposes were violated which, according to the fundamental intention of the contract, were to be followed in common by the members of the *special community*. And the sellers, by acting as they did, denied the principle that each one of the parties concerned must carry out his obligations so that he may be *his own neighbor*. Acting as they did, the sellers alone were in that position; whereas the buyer demands that this privilege should be given to both. For nothing is required of the sellers except that they remove what belongs to them and allow the buyer to use in an objective manner the land sold by them. They are not asked to make any additional sacrifice on their side.

The following dispute is somewhat parallel. The owner of a house leased his basement to a storekeeper. The contract said, "A basement containing a shop with a dwelling and other rooms besides." The shopkeeper set up in the courtyard adjoining the basement a wooden shed in which he kept boxes and coal. This the owner would not allow. The courtyard, he argued, belonged in common to all the stories of the house, and the stores kept in the wooden shed were objectionable besides because they were an annoyance to the other tenants and were the cause of dampness. The lessee appealed to the fact that the courtyard was accessible from his basement only and hence, although the contract did not say so specifically, belonged exclusively to him. The decision of the provincial court, which decided in favor of the lessor, seems just. The purposes of the lease in question could be carried out sufficiently without the use of the courtyard. In claiming the use of it for himself the lessee is seeking an exclusive advantage for one side. This requires special reasons, which were not present in this case.

An action that has been thoroughly discussed in recent times is that between Prussia and Saxony in the matter of the Berlin-Dresden railway. For our purposes the interesting point was the following. The joint-stock company which owned the railroad was licensed by both States. The company did poor business and was on the point of bankruptcy. Prussia took over the administration and management of the road. That the consent of Saxony was necessary no one doubted. But the Prussian government was of the opinion that the treaty between the two States imposed an obligation upon the Saxon government not to take undue advantage of their right of consent; and that there was no tenable ground in their contract with the company for refusing their consent. The Saxon government, on the other hand, claimed complete freedom of decision in reference to the entire change,

and objected to certain points in the agreement of sale. The question was afterwards settled by a court of arbitration. We shall cite here only the question of interpretation so far as it has fundamental importance. It was a question of carrying out the treaty between the States, which must also be interpreted according to our method (p. 392). The inquiry must therefore be conducted as follows: Which result in this specific question would enable each of the two parties to be its own neighbor, and which would allow this privilege to one only? In the single point mentioned above, the situation was no doubt this, that the whole purpose of the special community in our mind was to make possible a satisfactory management of the railroad. The contract which the company made with Prussia offered the possibility of attaining this object in the manner indicated. This thing as such did not demand any sacrifice from Saxony. The future rights of pre-emption of the two governments were not yet at that time in question. On the other hand, by denying the only possible recourse, the attainment of the object of the *special community* was frustrated by the one-sided desire of one party. We cannot enter here into a detailed account of the specific technicalities involved in the case, but we have here another illustration of the difference between the fundamental conception of the *idea of community* and that of an *aggregate of particular subjects* standing "*opposed*" to each other with the instrument of legal obligations, and endeavoring, each one, to carry out his own merely subjective desires. It all comes to the one point that our thinking *must* be *consciously* and *methodically* shot through with the idea of *just law* as the only competent court of appeal.

The following case was reported from England not long ago. Thirty years ago a steamship company in Liverpool wanted to enlarge their buildings and to acquire for this purpose a small piece of land belonging to an unmar-

ried lady of uncertain age. She sold the land at a very low price, but demanded that a clause be inserted in the contract by which she and her companion "should have the right of free passage on the company's steamships as long as she lived." On the day after signing the contract she sold her furniture, leased her house and went on board the first outgoing steamer of the company without troubling herself about the destination. Up to the time of her death she lived continually on a ship belonging to the company, always accompanied by a lady whom she found by means of advertisements and whose fare she pocketed. It was computed that by selling her estate in this way she made more than forty thousand marks. The company offered her several times a large sum of money for giving up this privilege, but the clever business lady always declined the offer. Now the old maiden lady is dead after having been for thirty years an object of deep concern to the steampacket company.

If this story is true, it shows a great lack of skill on the part of the lawyers there as to the "bona fide" interpretation of contracts. It turns upon the question of carrying out an obligation of the existence of which there is no doubt. The question concerns the *measure* of indebtedness of the obligor. In this case a doubtful contract must be interpreted in such a way that the obligor in carrying out his obligation may remain his own neighbor. This is the case only when the performance required of him is such that by granting free passage he will not be exploited in a one-sided manner by the other party. There will always be a certain amount of free scope in estimating and balancing the performances on both sides. But it is fundamentally unjust to suppose that by appealing to a few isolated words of the contract the arbitrary claims of the person entitled against the person bound can be declared sacred.

This is also the decision of Paulus in a celebrated case

of his "Quaestiones" (D. XIX 1, 43; 45). A person had sold a slave who, as it later turned out, really belonged to a third, who claimed his property. The buyer took the seller to account. The Romans often in such transactions made use of the "duplae stipulatio," that is, the seller promised the buyer in case of dispossession double the amount lost by him (p. 256). This was stipulated in this case also. But the buyer had in the meantime had his slave educated. He became a skilled racer or artistic dancer and was now valued at a very high price. The decision of Paulus is, "Si in tantum pretium excedisse proponas, ut non sit cogitatum a venditore de tanta summa, iniquum videtur in magnam quantitatem obligari venditorem . . . idque et Julianum agitasse Africanus refert: quod iustum est: sicut minuitur praestatio, si servus deterior apud emptorem effectus sit, cum evincitur" (cf. p. 296 ff.).

2. Principles of *participation* — (a) of *existence*. — Here we are dealing with the interpretation of contracts according to the meaning of which the one party is to a certain extent to be *excluded* from his social activity. This must of course first of all lie within the limits of freedom of contract (p. 338). Within this sphere a specific point becomes doubtful. We must then, in the absence of specific reasons to the contrary, give the preference to that one of the two possible ways of interpreting the meaning of the contract which will prevent the realization of an aim that is objectively inadmissible. In the other interpretation there is a stronger tendency to making of the contract a juristic act in violation of "good morals" or even against a "legal prohibition." For the details of the application we refer the reader to our former exposition of the method of *just law*. Here we call attention to the fact that in taking account of the *tendency* to *injustice* we have another objective aid in determining the *right* meaning of which we are in quest.

This will appear with especial frequency in the interpretation of such prohibitions of competition as are within the limits of legitimate juristic acts. An employee had to promise in this way that he would not "enter into" a competition with his employer. He took a position later in another firm, and a short time thereafter the latter began to compete with the former principal of our employee. The court justly decided that this was not covered by the prohibition in the contract. The justification is found in the remarks made above.

Following are the facts of a judgment in a lower court, the decision of which was satisfactory to the parties. The plaintiff was the lessee of a store situated in the house of the defendant, which he leased for a term of ten years. The contract of lease stipulated that the lessor may not lease any rooms in the same house for the purpose of carrying on the same business as that of the plaintiff. When the plaintiff moved in he was engaged in the laundry business, but he gave it up and was now selling cigars in the same shop, as the location of the house gave better prospects for the new undertaking. After the plaintiff had made the change, the defendant leased another of his rooms to a dealer in cigars. The plaintiff now demands an indemnity from the defendant, and the annulment of the contract (BGB. 536; 542). The denial of the action is justified by the tendency mentioned before, which can be seen in the demand of the lessee.

In a transaction providing against competition, the person making the promise undertook to refrain from carrying on business in "an adjoining street." In a doubtful case the limit must be drawn close. For with every extension we are liable to come across a really illegitimate transaction (p. 342). This precaution may be observed among other things by maintaining that the prohibition "to engage or take part in the same or a similar business," does not refer to any "business" ("Geschäft")

in the sense of a "juristic act" ("Rechtsgeschäft"), but only to a continuous activity aiming at the commercial sale of the same or similar articles. Also that the validity of the competition clause for the present employee "in case he resigns or has to resign this position," is not to be recognized when the employee is discharged without good reason. It should be enforced only when the employee resigns of his own accord or if the employer has a "good" reason for discharging him. We can see here very clearly, without the need of explanation, how these considerations are derived from the principle of participation that is pertinent here.

On the other hand this point of view may do good service in connection with the question frequently asked, whether a *full power of attorney* authorizes one to enter into all permissible transactions, including the drawing of bills of exchange, the sale of real estate and other such important dispositions. The question must be answered in the affirmative. For the legislators found it necessary to limit this power in important cases of representation, as in those of a confidential clerk, a guardian, an executor, and so on. But in this case this full power of attorney is limited by the freedom of contract; and it is only beyond this limit that we have to do with the objective injustice of a transaction (cf. p. 338). For this reason a manufacturer who gave a merchant the "exclusive right to sell his provisions," does not thereby renounce the right of selling his own goods or of employing travelling salesmen to find a market for them. For such limitation of one's power of disposition partakes of the character of an illegitimate transaction providing for omission; and hence even though it does not yet pass beyond the limit, it must not be taken as the *right* meaning of a contract unless there are special reasons for it.

We can now settle also the dispute mentioned above (p. 387) between Rome and Carthage. If one of the two

parties in that case was free to admit subsequently any one they pleased as an ally, then the obligation on the other side to leave those confederates definitely in peace would have constituted a sacrifice made to the subjective and unrestrained procedure of the one party. The contract contained a restriction of the personalities of the two States in their international affairs. It could be understood in two ways. Hence that interpretation has to be chosen which in its tendency departs from restraining one party by the subjective and arbitrary desire of the other. According to this therefore the procedure of Hannibal at that time could not be rightly considered as a breach of contract.

Simrock depicts with much humor the lawsuit between the cloister of Dünwald and the Junker Schlebusch. The monks, by means of legal and ecclesiastical aid, urged the recognition of their ownership of fields in the land of the Junker, which had been in his possession and cultivation for many years. Magistrate and lay judges did not know what to do, and the action dragged on a long time. Then the Junker proposed a settlement, which was adopted. "Very well, I offer my hand in peace; you shall possess what never belonged to you. But as I cede it to you of my own accord, be kind enough to let me sow the field for once again." This was granted. But in the spring a surprise awaited the monks: "Soft green leaves with notches sinuate — what is this that is ripening into a harvest? It is not corn nor wheat — Alas! indeed! we are betrayed! It is acorn seed!" This is good enough as a joke, but it can not be maintained seriously in court.

2. Principles of *participation* — (b) of *execution*. — These are involved in the work of interpretation as follows. A contract provides that one shall be excluded; and the point in dispute is the manner and extent of the exclusion. There is no doubt here about the fact of exclusion, but about the manner of carrying it out. I recall therefore

briefly to the attention of the reader in this concluding discussion the method which must be followed here also. We think of our parties as forming a special community in which their respective wills are combined in one. And then we adjust them in such a way, according to the principle just cited, that each of them in being excluded may still be his own neighbor; that there should be no preponderance of a one-sided desire determined by the arbitrary will of one of the parties, but that the result shall be constituted by an objective consideration of the interests of both sides.

The following case had to do with the terms of a contract of lease, which read as follows: "Building alterations must not be undertaken without the consent of the lessor. But if it is done with his permission, then all that is clinched and riveted must remain in the house when the premises are vacated by the tenant." Now this determination can not be taken to mean that the lessee is obliged to leave to the lessor without compensation all the constructions he made at possibly great expense. The agreement can only be interpreted to mean that the lessee is not entitled to remove his constructions against the will of the lessor, as the law would permit him to do (BGB. 547). But it does not follow from this that the lessee must leave them there without compensation. This would put all the burden of loss on his side alone, whereas in the other case each of the two would receive impartial consideration. The recent decision of the Supreme Court of Judicature agreeing in its result with the view here expressed must therefore be approved. The opinion of the court that otherwise the lessor would receive an "unjustified benefit," is not quite precise as a fact and incorrect technically. Technically speaking it is not a question of "condictio," but a charge arising from a *contract of lease*. The right of the lessee according to the last paragraph of BGB. 547 is transformed in the meaning

of the contract into a claim for indemnity. And so far as the real merits of the case are concerned, the justification of the judgment is found in the idea conclusively suggested by the principle of participation pertinent to the case.

Finally, reference may be made to those contracts in which there is to a certain extent a reciprocal exclusion of the parties concerned, but where the respective spheres of action are not made sufficiently clear. Such confusions have become chronic in well-known disputes in South America. In the year 1881 Chile and Argentina concluded an agreement concerning the boundary dispute in Patagonia. But this was afterwards differently interpreted by the two sides. And the same thing occurred several times up to the present day. The King of England, who was appointed as arbiter, has not yet been able, through his commissioners, to master the great technical difficulties which stand in the way of an examination and delimitation of the disputed domain. Similar questions and disputes may also arise in private life. To carry out our methods, the only way remaining is the one we described above when we treated the question of division according to "equity" (p. 290).

§ 5. *A point about which an agreement was intended.* — But the agreement did not take place. The parties have as a matter of fact not agreed. And this is shown either by the interpretation of each declaration or by the fact that one of the declarations is contested on account of error. Then, as we said before, there are two alternatives possible. Either the rest of the contract, about which there is an agreement, loses its validity as a whole, or it remains sound and legally effective; in which case it is supplemented as the merits of the case suggest on the point about which no agreement took place. What determines the choice between these two alternatives?

We have two passages in the Civil Code which must be

taken into account here. One is found in connection with the doctrine of void transactions (139), the other in connection with contracts (155). In our question the second is the proper basal determination. It speaks of the same thing as is mentioned at the head of this number, namely, that the parties intended an agreement but failed. A special kind of failure is when there is an error, which causes the act to be contested. When the contest is made the agreement becomes void from the start. In this roundabout way then, but not directly, a portion of an agreement that has been contested on account of an error and has thus become void, is reduced to the treatment of 139, which in itself views the matter not from the standpoint of contracts and their interpretation, but from that of the nullity of a transaction, no matter how it results.

But this slight complication from the technic of the Code has no effect on our present investigation and does not force us to make difficult distinctions. For the two paragraphs mentioned coincide in the point under consideration. BGB. 155 says that if an agreement did not take place on a given point, "those points which were agreed upon are valid in so far as it *may be assumed* that the contract would have been concluded without an agreement upon that point"; and 139 has the same ruling in case of partial nullity, though it is expressed in a negative form (p. 326). But neither of these solves our question. For what we want to know is, *What methodical consideration* will enable us to choose between the two alternatives above mentioned, in other words, when are we to "assume" that the contract as a whole is valid? We can not refer to the subjective intentions, for there is in fact no agreement; and what the one or the other alleges of himself alone has no relevance for the question of the content of a contract.

It follows therefore that here too the question whether the partially agreed upon contract shall remain legally

valid, can be answered only by considering *whether the points agreed upon, properly supplemented*, represent a contract in harmony with *the principles of just law*. If this question, in the specific case and the facts under discussion, can be answered in the affirmative, then "*we may assume*" that the points which were agreed upon are valid. But if the harmony must be denied, then the points agreed upon are also void; and that too without the necessity of its being contested by the one party; and on the other hand without the obligation of one of the parties concerned to indemnify the other for its negative contractual interest.

The Supreme Court of the Empire had to decide the following case. A dealer made a definite offer for the purchase of a horse. The owner replied by letter, dated April 17, "In regard to Brunsviga, I beg to inform you that the fixed price of the mare is 3500 marks, on condition that she run in Hamburg half for you and half for me . . ." In reply to this letter the person who made the offer telegraphed on April 23, "Your conditions satisfactory. Buy Brunsviga. Letter follows." After the horse had run at Hamburg on the 27th of April and won a prize, the purchaser telegraphed on the 29th of April, "Send Brunsviga Thursday if possible, preferably with jockey, who may stay." The owner replied the same day by telegraph, "Just arrived from Hamburg and found your telegram. You said, 'letter follows.' Have not yet received any final information by letter, and naturally did not sell."

It is clear that there were still other agreements to be settled, thus for example, time and place of delivery, the precise manner of sending, and so on. From this the Supreme Court (in opposition to the lower court) inferred that the contract was not yet concluded by the correspondence submitted. The parties had indeed come to terms about the goods and the price, but a contract can

not be accepted without agreement upon the conditions under which the contract of sale was to be carried out. The case would be different if the contracting parties had an understanding between them that in case of failure to agree on the points reserved, the regulations of objective law should decide on the mutual rights and duties.

But this is not convincing. The supplementary rules are laid down by the legislator in the laws of contract not only for those cases in which they were accepted by an understanding between the contracting parties; they are intended to fill in gaps in contracts even if the parties did not think of them. The proof that they did think about them is no necessary condition of their application. As long, therefore, as a partial agreement has taken place and the question is whether the contract as such is thereby concluded or not, the answer can not be made to depend upon this other question, whether the parties specifically agreed upon making use of the supplementary rules of the Code which might fill in the lacunae, or not. Our question must rather be answered by determining whether the points agreed upon together with the possible supplements gave a just result or not. If the parties have not yet agreed on the goods and the price, the matter is as a rule so indefinite that it can not be improved without making one-sided and arbitrary changes. To maintain the contract as valid under such conditions would be to violate the first principle of respect. But in the case under discussion there was no such hopeless vagueness, and it needed no arbitrary measures for its improvement. The agreement of the two parties as given there could easily be filled out *rightly* in reference to particular points left open. Even if the personal wishes of the purchaser which he intended to propose in the "letter" which was to "follow," had not been accepted by the other party, the matter could have been adjusted by the objective supplement, according to BGB. 269 and so on. Hence it could not have made

much difference if he omitted to send the letter he intended, and left the particulars to the law.

To sum up the results of this chapter, we have the following picture.

Interpretation			
of declarations of will		of contracts	
Determination of the " <i>actual</i> " will of the subjects and (by way of supplement) of the objectively just content in this case (133)	Contest on account of difference between the declaration (whether of the " <i>actual</i> " or of the just will) and the " <i>intelligent estimate of the case</i> ". (119)	A point agreed upon is uncertain: correction according to " <i>good faith</i> " (157)	A point provided for has not been agreed upon: The whole may be " <i>assumed</i> " as valid if the rest together with supplementary laws gives just law (155)

CHAPTER FIVE

JUSTIFIED TERMINATION OF LEGAL RELATIONS

§ 1. Denial of exclusive rights. § 2. A "valid" reason. § 3. Culpable "destruction" of marriage. § 4. Prevention of a result in violation of "good faith." § 5. Termination according to objective judgment.

§ 1. *Denial of exclusive rights.* — Not long ago a legal discussion arose as a consequence of the following incident. A small dog fell into a sewer and made his way from there to the first manhole of the grounds. All attempts to free the poor beast were without avail, because the shaft was too narrow. Firemen came to the scene, but could do nothing. Not to let the dog suffer unnecessarily, the place was pumped full of water and the dog was drowned.

The lawyers who expressed their opinions on the matter all seemed to agree that the killing of the animal in this case was not against the law. They discussed the facts of the case under the heading, "Injury done to an object from a feeling of humanity." But in so doing they appealed to a principle of which it is desirable to have a clearly thought out notion. And it is not made clear in the above whether the major premise mentioned is introduced as a positive law of the State or as a theoretical consideration.

One opinion is that the case in question should come under BGB. 904. But if we look up this paragraph, we find that it is only permitted to interfere with the existing property, but not to dispose of it as if it had no master.

Moreover the interference must take place to avert a danger threatening a third person, in which case the loss is to be proportionately estimated on both sides. In our case it can not be said that for the firemen "the interference was necessary *to avert a present danger.*" And if you think the matter is settled because the owner of the dog had no calculable loss — because the dog was lost anyhow — this does not decide the general question whether the killing of the dog was against the law or not.

Another point of view was this, that the act was not against the law because those who interfered and out of pity for the suffering animal put it to death, "had the right to presuppose the assent of the owner of the dog." I do not wish to deny this point-blank, but must ask, On what grounds is this presupposition allowed? And there is only one answer, Because the procedure adopted was the *objectively just* conduct in this situation.

But then arise the further questions, Is it necessary to choose the roundabout way of "presupposing" the owner's *assent* to a *just* proceeding? Should we not say simply, They have a right to do this because it is in accordance with *just law*? And finally, Would it be possible to bring an argument against the presupposition? Is there no possibility at all of interfering *against* the wish of the owner?

The essential characteristics of ownership which become significant in this discussion are well put in our Civil Code (903) as follows: "The owner of a thing may . . . manage the thing according to his pleasure, and may exclude others from any interference with it." As a result of these powers of activity granted him by law he stands in direct relation to all those who are subject to the law. He has a real claim to be respected by every one in his activity as above characterized, and he can carry out this claim in any particular case against any one who acts in opposition to it. But here too we must avoid the error

of supposing that the person exclusively entitled has this right from himself. We always come across the naïve belief — deep-rooted through economic liberalism — that in social life individuals are opposed to each other, each with his own rights and absolute powers, independent of the social order which is a creation of the State and secondary in character. I shall not take this simple error up again here (cf. p. 146; 177; 186). We make mention of it here only to establish the thought that all ownership and every exclusive right is given to the individual by the community; that he would not have it unless it were granted to him by it.

And we must emphasize this thought here not in the interest of *formal* clearness, but in order to establish and carry out the *objective* idea that the granting of exclusive rights to individual members of the community is only a technical means to bring about just co-operation. The moment it ceases to do the latter, it has lost all real justification. And this is the case if in maintaining the exclusive rights, we have regard to nothing else except personal humor and arbitrary desire. This goes directly counter to the first principle of participation. This is the case if the person who is allowed the exclusive right can no longer say to the one who is mentally placed in a special community with him, I must exclude you because I must have this power in order properly to fulfil my duties to the community. I must have it because otherwise it does not seem possible to have successful co-operation, and it must be maintained in the interest of a good community — but says instead, You must not touch this object because such is *my* will, and you must do and omit to do in relation to it, what *I* desire.

For this is the difference right here between a will that is valid subjectively only and one that is objectively justified. We strive after the latter. And the other has in reality no intelligible meaning.

Now in practice there is a fixed and simple limit to this consideration, and that is, human possibility. When the control of a thing is no longer possible and can never again become so, it is a vain bandying of words to maintain one's right and exclude interference. The exclusive right which once existed has lost the real ground of its existence.

Now what use does our positive law make of these considerations in the arrangements commanded by it? Has it succeeded in its endeavor to lay down just regulations? A detailed examination shows that the law has no specific provision for the questions introduced here. The Civil Code has no special section on the theory of ownership treating of the *loss* and *disappearance* of this right. The latter are always treated in connection with the facts of *acquisition* as its reverse side. And the same thing applies to the other exclusive private rights, namely that the legislator has not treated specially the question here suggested.

The regulation of BGB. 226 is of no significance here. In the first place it is not a question of the permissibility of a *particular* exercise of ownership, which continues to exist thereafter, but whether this legal relation should not in a given situation *terminate* entirely. Moreover the limitation of the unpermissible exercise to *malicious damage* has no relevancy to the facts we are considering now. We are dealing neither with the practice of "deception" against one's neighbor or partner, nor with the *infliction of damage*. If therefore BGB. 226 is inapplicable to our present question, it is a circumstance, as was said before, of advantage to us (p. 252 ff.). For this "deception-paragraph" appears on further consideration not as a progress but as a positive hindrance in our striving after a just law. I find in fact only one instance in all the pertinent legal sources, where the problem concerning us here has been precisely conceived and expressed. It is in an otherwise neglected passage of Ulpian, who has

taken up an exposition of Pomponius in his commentary on the edicts (D. XLI 1, 44). Wolves had broken into a herd of swine and taken some of them away. A neighboring farmer pursued the wolves with his strong hounds and succeeded in getting the swine away from them. Had he the right to appropriate the swine for himself? The lawyer decides simply that as long as the loss can be recovered, it remains the property of its master. If not, he loses his exclusive right. "Cogitabat tamen, quemadmodum terra marique capta, cum in suam naturalem laxitatem pervenerant, desinerent eorum esse qui ceperunt, ita ex bonis quoque nostris capta a bestiis marinis et terrestribus desinant nostra esse, cum effugerent bestiae nostram persecutionem; quis denique manere nostrum dicit, quod avis transvolans ex area aut ex agro nostro transtulit aut quod nobis eripuit? . . . sed putat *potius nostrum manere tamdiu, quamdiu recipari possit*: licet in avibus et piscibus et feris verum sit quod scribit. idem ait, etsi naufragio quid amissum sit, non statim nostrum esse desinere: denique quadruplo teneri eum qui rapuit. et sane melius est dicere et quod a lupo eripitur, *nostrum manere, quamdiu recipi possit id quod ereptum est*."

This should be the position taken in our present law also. We must find out in every case whether it is at all possible that the person entitled may recover his object. If this possibility no longer exists, then the exclusive right of the one really entitled also ceases to exist. For example, a person finds in the hot season things that spoil easily, a bag of strawberries, fine pastry, and so on; or perhaps a ticket of admission to a performance that is to take place immediately. All efforts to return the object to the owner are unsuccessful. There remains only the choice to allow the thing to perish by nature or to make use of it oneself or dispose of it in some fitting manner. Here to maintain a right which can never again be realized can not, as we said before, be in the spirit of the social order.

If the law has specifically justified certain particular cases in a technically final manner, this does not exclude supplementation by the norm just laid down. The details of the law concerning the loss of ownership in wild beasts (BGB. 960) as well as in swarms of bees (BGB. 961) is meant for these only, and not as an advance decision for other objects. The same applies to the *law of salvage* (RGes. 17; V. 74). In the regulations governing *finding* (BGB. 973; cf. 966–979) and *treasure-trove* (BGB. 984), there are special modes provided only for *acquisition* of ownership. On the other hand its loss is made to depend upon the impossibility of utilization; and the only thing that is specially determined are the circumstances under which in a specific case this impossibility must be assumed. But the case with which we started this discussion as well as the examples above mentioned of objects which must necessarily be used at once, are not technically treated in our laws at all. But this does not mean that an exclusive right once recognized continues forever without regard to anything else and simply according to the subjective desire and conception of the person entitled. On the contrary, the silence of the law leads us to infer that in these cases we must find the result that will be *just* (cf. p. 209). Accordingly we must lay down the following proposition for our civil law, namely that when all possibility of recovery is, according to our best judgment, excluded, ownership and other exclusive rights in the object in question cease to exist.

§ 2. A “*valid*” *reason*. — Among the most difficult questions of civil legislation is that of the influence of changed conditions upon the continuance of obligatory relations. And the difficulties are not so much those of theoretical legal science as of legislation. The thing that seems often hard is the choice of the right means to bring about the right result. The legislator must remember that in many cases to carry out unconditionally a con-

tract that was concluded some time before must be nonsense if in a way that could not be foreseen the actual basis of the obligatory relation has dropped out and an entirely different situation has been created in its place. And on the other hand, he can not forget that if we allow easily a one-sided right of withdrawal, the security and reliability of civil legal intercourse may receive a serious blow. On the one hand, all contracts and all obligatory relations are only conditional means to certain ends. But on the other hand, confidence in their constancy is an important factor in social enterprise and successful co-operation.

Thus has arisen the compromising regulation which has become known by the catchword, "*clausula rebus sic stantibus*." The several laws show important differences in this regard. It is not our purpose to follow these in detail. There is only one specific point in regard to which we must for some other reason observe them. For as it is, the law often does allow one side the right of withdrawal in existing obligatory relations if there is a "valid" reason. Leaving aside for the present the further possibilities of termination of obligatory relations according to technically defined conditions, we must first explain how it comes about that that means of "lenient" law is introduced into the positive law, and at the same time institute a methodical investigation of the manner of applying and carrying it out justly in a particular case.

Our expression is applied, as just described, in our present civil law (a) in connection with notice given by one side of the termination of a contract of service (BGB. 626; GO. 124 a; 133 b; giving rise to the difficult question of the relation of these determinations to each other; HGB. 70-72; 77; 92). (b) To exclude the loss arising from "premature" notice (BGB. 627; 671; 712; 723; cf. 2226). (c) In connection with the right of a bailor to demand the return of the bailed object before the time

(BGB. 696). (d) As a reason for a premature termination of a partnership (BGB. 723; HGB. 339); for the dissolution of an association contrary to agreement (BGB. 749; cf. 2042; 2044); for a judicial dissolution of a public company (HGB. 133; cf. 161).

A "valid" reason justifies the revocation of the appointment of the governing body of an association (BGB. 27); the withdrawal of the right of management or of representation conferred upon a partner (BGB. 712; 715; HGB. 117; 127); the discharge of a guardian, of a counter-guardian and of a caretaker upon their application (BGB. 1889; cf. 1895; 1897; 1915); likewise the discharge of the executor by the Probate Court (BGB. 2227).

A person entitled to support may, if there is a "valid" reason, demand satisfaction by way of a principal sum instead of the money rent that is due him (BGB. 843; cf. 844; — 1580). The obligation to pay an indemnity on the part of a person who rescinds a betrothal does not occur whenever there is a "good" reason for the rescission (BGB. 1298; cf. 1299).

In some cases, it is true, the expression, a "valid" reason, is used also for the right carrying out of legal relations which continue in force. This occurs three times in the Civil Code, in refusing permission to sublet (BGB. 549); in requiring a thing to be produced ("actio ad exhibendum") in another place than the one in which the thing is situated (BGB. 811); in replacing the parental consent by the Court of Guardianship when the parents refuse to grant their consent to the marriage of a child that has reached the age of majority (BGB. 1308). In these situations we must apply the previous doctrine concerning performance "in good faith," as well as that of avoidance of "abuse" in family rights. This distinction causes no difficulty. Here we are concerned only with the influence of a "valid" reason in effecting the *termination* of a legal relation.

A cursory examination shows that this question is of very great importance in direct practice in the most widely divergent spheres. It would therefore be a very inadequate mode of procedure simply to fall back upon examples. It is clear that we must first make sure of the concept of a "valid" reason, and then we can illustrate it by applying it to particular cases.

It needs no lengthy discussion to show that the important element in this concept is the idea of a *justified regard* of conditions. Here is a legal relation that is well founded. There is no fault to be found with its origin or content. But the conditions have changed to such an extent that we *can not expect* one of the two parties to continue in his obligations, "Etiam ea, quae recte constiterunt, resolvi putant, cum in eum casum recciderunt, a quo non potuissent consistere" (D. XLV 1, 98, pr. 1. f.). The technical determinations of the laws and the juristic acts undertaken in accordance with them are not sufficient to stifle the doubt that has arisen. We must consider the *objective justification* of the legal relation in question. But in order to decide this question in the affirmative or the negative we must apply to this particular sphere the method by which we arrive in general at the justice or injustice of a legal content. This gives us the following definition. A "valid" reason is a circumstance which makes impossible the attainment, according to the principles of just law, of the purpose intended in the particular association.

Now since the question here is whether an existing legal relation shall continue or not, the norms which are to guide us are those principles which aim at *existence*, hence, for the present, the first principle of respect as well as of participation. This simplifies considerably the application of our concept of a "valid" reason. And we can go further and show that its influence extends in two directions: 1. As a circumstance which so changes the situation that the

will of one of the united parties becomes subject to the arbitrary desire of the other; and 2. As a factor which excludes one of the partners arbitrarily from social co-operation. And this leads us to another conclusion, namely that the decisive determination of the concept in question and its application in practice are given by *the principles of just law*. But it follows from this that a result such as described can not be set aside by a private legal transaction. In particular, an agreement which would limit or rescind, in the cases cited above, the right to give notice of termination for "valid" reasons, would no longer remain within the limits of freedom of contract. In a specific case the partners had a mutual agreement that in case of withdrawal from partnership the one giving notice shall pay the other a sum of money. This too was properly declared void by the court if the withdrawal was due to a "valid" reason.

The other illustrative examples can also be classified according to the two principles employed here. These are now assumed as known, and so is the use of the idea of the special community as a model of just law. And in carrying them out we shall follow the types of performances.

(1) A "valid" reason according to the principle of *respect*.

(a) The one party is required to allow the abuse of *his person* arbitrarily by the other party.

This is the case when one is justified in rescinding a betrothal. Properly speaking a betrothal signifies a legal relation of trust by which each party is obliged to do what is necessary to enter marriage at some time thereafter, or else to conclude the marriage itself. That the investigation is intended to find out whether there is a "valid" reason for rescinding the betrothal, shows that there existed a *legal relation*; and naturally the only thing that gives rise to such a relation is a contract. Accordingly a

“valid” reason would signify, in this connection, any circumstance which makes the aim of married life impossible of attainment, because one of the parties is not in a position to realize the idea. This may be due to his conduct or to his qualities. The breach of betrothal belongs under all circumstances in this connection, as follows necessarily from the essential reference made above to preparation for marriage. The possibility of reversing the question as in BGB. 1299 follows of itself.

The question has been asked whether “irreligion” is a justifiable reason for direct dismissal. A workman in a large factory was discharged without previous notice because he refused to have his marriage solemnized in church despite the repeated orders of his principal. The question can be solved correctly and on good grounds if we bear in mind the precise meaning of a “valid” reason as defined above. According to this definition we must not apply a ready-made standard from without. We must rather observe the particular purpose of the special community in question, and find out whether, in view of the conduct under discussion of the one party, it can not be attained by the other except by violating the principles of just law, that is, in this case, by a one-sided sacrifice of his person. This can not generally be maintained for the question we are here considering in the case of an ordinary factory workman. The question might be doubtful in case of an employee who is taken into the community of the home. And it would be a clear instance of violation of the principles we have in mind if the association or service was established for the very purpose of promoting religious devotion, and one of the parties suddenly proceeds in the manner above indicated.

A challenge by an employee of his principal to a duel has been properly considered a “valid” reason for a dissolution of the relation on the part of the latter. For here the impossibility is quite clear of realizing in the future in

harmonious co-operation the aim that was set by the special community that existed hitherto.

Conversely, the Prussian "Master and Servant Act" of 1810, says that, "The servants may leave their service without previous notice, . . . if their masters wanted to induce them to act against the laws or in violation of good morals" (138). This rule was adopted in the "Industrial Act," 124, 3. When this is the case can be derived from the second chapter of this Part. To demand such acts constitutes personal abuse, which makes impossible the carrying out of a special community according to just law.

(b) Abuse by the one party of persons *belonging to* the other.

The placing of children in a boarding school is a contract which differs from an ordinary lease of service by a specific relation of trust. Ill treatment of the children is naturally a sufficient reason, according to the point of view stated above, for immediate withdrawal by the one party. Nay, a well-founded fear of such treatment would be sufficient for withdrawal, for example, disputes between the parents and the managers of the boarding school concerning the right care and education of the children.

Seduction by servants of children and of other persons entrusted to their care, is a "valid" reason for dismissal without previous notice; and it can be easily derived from the considerations mentioned above (cf. also Prussian Servant Act, 120).

We also pointed out in previous discussions that a contract for apprenticeship can be terminated as soon as it appears that the main purpose, namely, the training of the apprentice, can not be attained in the manner in which the master conducts the instruction (p. 268). The "Industrial Act" does not use the expression "valid" reason in 127 b, but empowers one to rescind the apprenticeship (apart from the specifically technical grounds

of the law), "if the master *neglects* his legal obligations toward the apprentice in a manner endangering the latter's health, morals or education, or *abuses* his right of parental discipline, or becomes incompetent to fulfil the obligations incumbent upon him by law." This facilitates considerably the further carrying out of the theory in practice.

(c) A "valid" reason in the care of one's *property*.

A bookkeeper was employed in a co-operative society. The managers decided to order money bags, and to get competitive estimates from two firms. One asked ninety marks for ten thousand bags, the other eighty-seven and a half. The bookkeeper communicated this secretly to the first firm, and they at once sent in an offer for eighty-five marks. Thereupon the managers of the society discharged the bookkeeper without previous notice. He sued his employers for two months' salary, for the remainder of the unexpired term of employment. The lower court maintained the action, the appellate court dismissed it. As a matter of fact not every violation of duty can be regarded mechanically as a "valid" ground in the meaning here intended (it is different in partnership, according to BGB. 723). The point that decides the question is whether the aim of the co-operation as such could be attained during the time of notice. Immediate discharge is permissible only if this aim can positively not be attained. It follows therefore that the judgment of the first court has more in its favor than the second.

The following case is different. A kitchen chef was secretly betrothed to the barmaid, and the two together cheated the proprietor of the inn (cf. D. XIX 2, 38; C. IV 65, 22).

There are some directions in the responsa of the Roman lawyers in relation to the right of one partner to give notice of the dissolution of the partnership (BGB. 723): "Nec tenebitur pro socio qui ideo renuntiavit, quia con-

dicio quaedam, qua societas erat coita, ei non praestatur: aut quid si ita iniuriosus et damnosus socius sit, ut non expediat eum pati? — vel quod ea re frui non liceat, cuius gratia negotiatio suscepta sit? — Idemque erit dicendum, si socius renuntiaverit societati, qui rei publicae causa diu et invitus sit afuturus: *quamvis nonnumquam ei obici possit, quia potuit et per alium societatem administrare vel socio committere*; sed hoc non alias, nisi valde sit idoneus socius aut facilis afuturo etiam per alium societatis administratio" (D. XVII 2, 14-16 pr.). This can be considered a model statement so far as the wording of the decisions is concerned.

A peculiar case of termination for a "valid" reason is the replacing of money rent by payment in a lump sum. There are very recent decisions according to which this is recommended when the person who is obliged to pay an indemnity for injury, according to BGB. 843, is not in a position to assure the payment of the rent. This would be the correct thing in every case where in the specific situation the first principle of respect would not otherwise find its realization.

The case where the creditor has no longer any interest in the fulfilment of the obligation forms only a special application of the theory we have been discussing. We must admit that the case as just stated is not quite precise in its expression or significance. It went back, in the earlier doctrine of the Pandects, to some passages of the Corpus Juris, which may be partly explained by reference to the condemnation of money made necessary at that time, and partly the justification of the decision does not always appear correct or exhaustive. But altogether the difficulty can not be removed, which arises from the fact that the reason for a claim has ceased to exist. And in recent legislation renewed importance has been attached to the question of the obligee losing all interest in the fulfilment of the obligation. We can make a distinction

here. The creditor may refuse an incomplete or tardy fulfilment if he "no longer has any interest in it." This, as is well known, the Code has provided for in a significant manner in connection with the carrying out of mutual contracts. In that case too, to be sure, the deciding factor is not the subjective pleasure of the creditor but an objectively justified interest. But he merely has to show naturally that a sacrifice is now required of him which he would not have had to make if the debtor had carried out properly the idea of the special community. And in the second place our question may appear in favor of the obligor.

A person was culpably injured by another. The latter admitted his obligation to indemnify the injured party, who was incapacitated from work. After considerable negotiation they came to terms on the amount of a money rent. After a year the injured person became completely well and able to work again. If the debtor had been found liable in a final decree of the court, CPO. 323 would be in order. But for a private contract there is no corresponding legal determination.

The lessee of a shop stipulated, under penalty of a fine, that the owner should not lease another shop in the house to a person who, like the lessee, was engaged in the laundry business. Soon after, the lessee gave up this branch of the business and went into the sale of cigars. The lessor now leases the neighboring shop for a laundry (cf. p. 424).

The decision of such questions according to principles of just law is not difficult. The purpose intended by the special community has been given up by the resolution of one of the parties, and its attainment has become impossible. So far as this is the case, he can not in view of this circumstance continue to impose obligations upon the other party in his own benefit, obligations which had meaning only as means for the realization of the original

purpose. Thus the Romans decided in case of a formless release (of a claim), accompanied by the stipulation of a penalty, that the debtor who pleads the release must assume thereby that the penalty has been received (i.e. he can not plead release and claim the penalty too). (D. II 14, 10, 1; — cf. D. XXVII 9, 10).

But it may very well be a matter of doubt whether according to the civil law now in force it is permitted to take account of such fundamentally just grounds of termination of claims. In so far as such claims are based upon contracts, the question has to be answered in the affirmative. For the meaning of these contracts must be determined in "good faith," and hence, in doubtful points, must agree with our principles (cf. p. 410). But if this is not clear, we can not point to any norms of our positive law that justly give us this authority. And its silence can only mean really that regard for the grounds of termination mentioned above is excluded in all unilateral and in statutory obligations.

2. A "valid" reason according to the principle of *participation*.

There can be no doubt that there may be "valid" reasons for the termination of exclusive rights also. The general definition of the concept as given above (p. 441) must necessarily have this effect under the circumstances indicated. These would be cases in which, if we were to maintain the right of exclusion in its rigor, it would result in leaving some member of the legal association isolated by himself. He would have to suffer in his person exclusion from social community, and would have to pay with his person for the unconditional existence of that exclusive right. This would make him an object that is excluded by the arbitrary pleasure of another. And if we think of the special community which embraces this person and the one possessed of the exclusive right, we see that it is in violation of the idea of *just* social living, and that the

latter can be maintained only by abolishing the exclusive right in question.

We see that this enables us to take proper account of the cases of necessity that have often been touched upon. The history of the theory of necessity exhibits many variations of facts and their right interpretation and decision. Now they are placed under the technical law. And it is hard to conceive of other problems in which there is equal occasion for pronouncing judgment directly according to the principles of just law.

In particular they must not be confused with those cases in which the fulfilment of obligations entered into is possible only by making new sacrifices of a kind that had not been foreseen. A manager had to administer the estate of a man who had become very sick and was compelled to stay in the South. Then he became the owner of a small possession in another province, which now urgently required his care. Does this constitute a "valid" reason for withdrawing from the contract without previous notice? The same question may arise in different circumstances also. Take the case of a female employee who is offered an opportunity of a good marriage (cf. Prussian Servant Act, 54). Or imagine the following case. A traveller engaged board in an inn on favorable terms on condition that he would remain some length of time and give eight days' notice before leaving. Suddenly, for personal reasons, the traveller finds it necessary to leave.

These facts are not unimportant from the point of view of method and may be briefly emphasized here for this reason. We must be careful, in considering the question of a "valid" reason in these cases, not to look exclusively upon the side of the person who seems at first sight perhaps to be particularly the loser. The question must be considered objectively. The decisive point at issue is whether the specific aim of the special community can still be attained without violating the principles of just law.

And here again we must distinguish between the elements of *existence* and *execution*. Now in the cases just mentioned, there is no occasion for an absolute rescission of the well-founded relation of obligation, *in its own meaning*, even under the changed conditions. The effect of the change is merely that in fulfilling his justifiable obligation, which is still in force, the one party must make a special sacrifice. This means that to insist on the continued fulfilment of the obligation without change would not be in harmony with the principles of *just execution*. In other words, the cases last mentioned do not belong to the category of dissolution for a "valid" reason, but under that of carrying out and performing in "good faith."

§ 3. *Culpable destruction of marriage*. — Dissolution of marriage is essentially nothing else than the rescission of a legal relation because there is a "good" reason for it. We are not here concerned with the distinction between divorce and judicial separation; because the dissolution of the marriage bond as well as the modified separation "a mensa et thoro" are subject to the same conditions in modern law.

In accordance with the method indicated above, a valid reason for divorce is to be assumed if the object intended by the marriage community can not, in a specific case, be attained according to the principles of just law. We will therefore first analyze the fundamental idea of matrimonial association and then endeavor to apply the principles in selected cases. We shall take no account here of recognized deviations from the established view of marriage, nor of the obsolete and curious introductory propositions of the Prussian General Provincial Law in its second part.

In marriage is embodied the idea that in the complete surrender of his own person the party wins it back again in receiving the like unconditional surrender of the other party, — a conception which we have already had occa-

sion to use in another connection (p. 280). Now one of the spouses by his conduct may introduce a contradiction into the working out of this idea. This would be the case in a mode of conduct giving expression to the fact that he is not willing to surrender himself completely to the other party either now or in the future; and it is immaterial whether he is partly or wholly conscious of it, or not at all. For in all these cases the fact itself implies that the other spouse is required to be an object of the subjective desire and arbitrary pleasure of the one who has failed to fulfil his obligation.

Matrimonial fidelity is therefore simply the warranted result of *consistent thinking*. Its claim has so far nothing to do (as modern subjectivism naïvely thinks it has) with obscurely felt moral theory, not to speak of mere tradition of unproven or unprovable dogmas. It is rather based upon the necessary desire *to avoid a contradiction in thought*. He who reduces himself or other persons to a mere means of a conditional end; who disregards the idea that humanity is an end in itself and treats men as he treats animals and chattels, a person like this is simply *illogical* if he expects others to honor him as the bearer of an unconditional purpose, and not rather as a limited means of others' purposes and as a mere object of their pleasure.

Now in sexual surrender one permits another the arbitrary disposition of one's personality. And to avoid the consequences mentioned, the only means left is that spoken of before in connection with the concept of marriage. Accordingly there is at once a contradiction here in entering into a matrimonial community, if we wish to maintain a legal relation the carrying out of which (since it is based upon complete mutual surrender) is made impossible by the one party. And, furthermore, since in a complete and permanent sexual community is necessarily implied a complete union of life and existence, there would

be a "contradictio in adiecto" if while maintaining the marriage relation as a whole, we should permit an arbitrary breach in a particular point.

This might lead one to think that the law of the future will not lay down any specific grounds for divorce. It may seem better to give an instruction in general terms, using perhaps the words, "valid" reason; or the law of the future may find it sufficient to lay stress upon the meaning of marriage, and leave the grounds of divorce to be inferred from it. In any case when we think of such a possibility we always mean to say that the law is conscious of its aim to effect *justice*, and does not, like the Roman law, leave the existence of the marriage to the subjective pleasure of the one spouse.

But the legal systems of interest to us to-day have not proceeded in the manner above indicated as possible. They made use of the one way that was described in the previous book among the means of just law. They laid down in technical formulation the *specific conditions* under which divorce is permissible. Thus at the present time also the Civil Code lays down the rules in three paragraphs (1365-1367). This, however, does not make divorce essentially more difficult; on the contrary, it makes it easier as compared with inferences that might be made from the fundamental legal idea of marriage. Marriage is a *permanent* community of life. A *single* error of one spouse, of the kind indicated in the law as a ground, need not necessarily make the future attainment of the intended purpose of the marriage impossible; and yet this alone would justify the dissolution of the marriage, according to what was said above. And this is the consideration also which the advocates of the canon law cite in their favor against the dissolution of the marriage bond, namely, that marriage is a bond for life, and that the way of reconciliation of the divided spirits should never be cut off by separation and re-marriage of one of the spouses.

And the same idea is expressed in our present Code (BGB. 1570), when it says that the right of divorce in the case of guilt of one spouse as designated by law, is barred "by condonation" (cf. D. XLVII 10, 11, 1).

The so-called "absolute" grounds of divorce in the Civil Code take no account of the consideration mentioned. They are based upon the fixed expressions of the legal system, which here again is content to cover the average cases. And in these it is pretty well justified in assuming that the dissolution of the marriage in consequence of a single occurrence of a ground for divorce will, *as a rule*, justify itself objectively. The discussion of the grounds for divorce which we have considered so far belongs therefore to *technical* legal science. The same thing applies to mental disease as a ground (which we shall omit here), namely that it too can be treated in a technical way only, on the basis of the reports of medical experts. But we are concerned in our present discussion with that final ground for divorce which the lawyers are accustomed to call in this connection the "clausula generalis." "A spouse may sue for divorce if the other spouse, by grave violation of the duties of marriage or by dishonorable or immoral conduct, has *caused so grave a disorder* of the matrimonial relation that the spouse *can not be presumed* to continue the marriage" . . . (BGB. 1568).

Here we have a reference to principles of just law as justifying an action for divorce. Not, however, again, in a general way, as was the case in the justified rescission of a betrothal, but with positive limitations. For in a justified withdrawal from a betrothal the important point is merely whether the intended matrimonial community can still be truly attained under the newly discovered or newly arisen conditions, without regard to the origin of the preventive "valid" ground. Whereas according to BGB. 1568 it is necessary that the ground for divorce shall have been created by a culpable act of one party,

as further described in the law. For the expression "dishonorable or immoral conduct" the reader is referred to the previous discussion of this matter (p. 283).

On the other hand the relation of the ground for divorce we are considering now to the previous discussion of the possible "abuse" of a matrimonial right may be conceived as follows. In the latter we consider only the *present existence* of a violation of matrimonial duties; whereas in divorce, on account of the "grave disorder" of the matrimonial relation, the important point is whether *in the future* it seems that a complete community of life is destroyed and the hope of an enduring improvement is according to human estimation excluded.

To apply in practice the norm expressed in BGB. 1568 we must make a distinction involved in the meaning of the rule. 1. There is the question of the offence specifically designated. 2. We must determine whether thereby so "grave a disorder" as was just described has actually arisen. Here we must be careful not to devote too much of our attention in a given case to the first of these two questions, thus running the danger of devoting less energy to the second. For the second question rightly forms the central point of our deduction. The former has to do simply with obedience to the duties commanded by technical law or by the principles of just law, of which we spoke before. And it may be easily supplemented by taking account of the specific consequences which follow therefrom for the matrimonial relation in particular instances. Here the question may arise whether we can refer to the ground of divorce mentioned in BGB. 1568 when the offence is closely related to the three so-called "absolute" grounds for divorce, but is not actually one of them. For example, can sexual crimes which are not covered by BGB. 1565 be made valid grounds according to 1568? Can the non-fulfilment of the matrimonial relations which can not be cited as wilful desertion under

BGB. 1567 still be effectual according to the norm now under consideration?

Judicial law, it seems, has a tendency to vacillate in this matter. The proper solution would seem to be this, that in general it must be considered permissible to supplement the specific items of the positive law by a general regard for a culpably "grave disorder" of the matrimonial life; but there is bound to be a difference in the decision of different cases resulting from a precise application of the particular grounds for divorce. Thus criminal offences against sexual morality can without doubt satisfy the conditions of BGB. 1568, whereas the mere suspension of the marital relation can not. The only way to proceed in this latter case would be no doubt to follow closely the specific details of wilful desertion as laid down in BGB. 1567.

If it is a question, however, of a method that is to serve as the basis of our decision of cases, chief stress must be laid upon the question whether the offence of the one party caused a real and profound "disorder of the matrimonial relation." The question is asked, indeed, in legal and other discussions, whether this or that conduct is a sufficient ground for divorce. But this can be determined only for the four technical grounds of divorce as laid down in the Code, but can not be done in our present discussion according to BGB. 1568. This paragraph also cites "gross ill-treatment" as an example. But this too can not be taken simply as an independent legal fact. The important question in all these cases is whether such ill-treatment brings about the destruction of a good community of life. And this question does appear in the numerous judicial decisions in cases of "cruelty"; although the twofold mode of consideration here proposed may be made still more precise and emphatic.

If instead of this the courts show the too practical tendency of laying down easily comprehensible rules, the

results are, in some cases, curious. "An ordinary box on the ear," says a judicial opinion, "may cause some slight discomfort for a short time, but it is not dangerous." The same was assumed in case of "kicks" if the person was kicked "in the foot." The judge was more impressed, however, in his decision when "wine glasses were thrown at the other party's head, and he was struck with a boot." The attempt to lay down a fixed limit for the length of imprisonment as a ground for divorce, is also unfortunate. Thus a former practice has become a maxim, "that imprisonment of at least four years' duration gives the innocent spouse the right to sue for divorce." And a former judgment of the Supreme Court of the Empire is surely unjust, which says, "The ground for divorce is not the criminal act itself, but the act with its *punishment*." In view of this it is not to be wondered at that when an offence on one side is set off by an offence on the other, the action for divorce is denied; and that in the old theory they finally arrived at twenty-seven grounds for divorce. All mechanical certainty in this case is evil, and can be attained only at the expense of real justice. It will not do to lay down a rigid law that will be "practically useful," in the manner of the instructions given to a clerk at the counter. The judge should learn the concept and method of *just law*. Following the guidance contained in the principles, he must in each case think out independently for himself whether the matrimonial community may still be fulfilled in the spirit of these principles or whether the offence of the one party has made it impossible.

§ 4. *Prevention of a result in violation of "good faith."*
— An apparently difficult lawsuit was once carried on between two Greek sophists. It has been handed down to us by Roman writers, especially Gellius in his "Noctes Atticae." And they tell us that the judges before whom the case came up were so confused by the pseudo-arguments on both sides that no decision was handed down.

The facts are as follows. Protagoras of Abdera had bound himself by contract to instruct Euathlus, a rich young man, in the art of speaking, and particularly in the art of the advocate. The honorarium agreed upon was twenty talents, half of which was to be paid at the beginning of the instruction, and the other half at the conclusion thereof, as soon as the young man had won his first lawsuit. The instruction began as soon as the first half of the fee was paid. The instruction came to an end and Euathlus did not pay the balance, nor did he undertake any lawsuits either for himself or for others, though he practiced the art he acquired, by giving occasional legal advice. Finally Protagoras became tired waiting and brought an action for the payment of the ten talents. He said, The defendant must pay under any circumstances. If he is found liable, he must pay by reason of the judgment of the court. If he wins the suit, he must pay according to our contract. Euathlus argued on the contrary, I must not pay in any case. Either I lose the case, then I need not pay, as the contract stipulates; or the plaintiff's action is denied, in which case I do not have to pay, being released by the court.

Every modern lawyer sees at once that this case must be decided according to BGB. 162. It reads as follows: "If the happening of the condition is, in violation of good faith, prevented by the party who would thereby be put to disadvantage, the condition is regarded as having happened. — If the happening of the condition is brought about, in violation of good faith, by the party who would thereby derive advantage, the condition is regarded as not having happened."

This rule is taken from Roman law, where it is found in particular decisions of the Roman lawyers as well as in general expressions of the same. Modern legislation has given it an original turn, especially in its second part. Parallel in a sense to this are, BGB. 1299 (see above p.

443); 628 (cf. D. XIX 2, 19, 9); also 2113. A specifically formulated rule is found in BGB. 2076. But BGB. 815 especially must be placed alongside of the others. It speaks of "condictio causa data causa non secuta," and bars it (other conditions remaining the same) "if the result was impossible 'ab initio' and the performer was aware of it, or if the performer prevented the result *in violation of good faith*."

Both of these regulations of the law are interesting in their positive connection. The former must be worked out in detail according to the theory of conditions. It may happen in this connection that the prevention or the bringing about of the condition happens *too soon*, as in the following case. Two building contractors ordered wood for building operations. One half of the price was to fall due as soon as the interior and exterior decoration of the houses was completed, the other when the buildings were admitted to insurance. Then the contractors discontinued the building operations entirely. The correct decision was that in each case the part payments did not fall due until the two conditions were fulfilled in the ordinary prosecution of the building operations.

The second rule above mentioned finds its explanation in the theory of unjustified enrichment. It is not our task to follow up all this in the interest of technical law. Nor does it pertain here to analyze the possibilities that may arise according to BGB. 162 for conditions precedent and subsequent, and in each of these for personal and real rights. What we have to do is to show the methodical application of the theory of *just law* to this special form of judgment according to "good faith."

We have placed this discussion in this section although, as is evident, the result with which we are concerned here does not always have to do with the *termination* of a transaction. And yet it is always a question of a termination of the legal situation existing hitherto, and a final

alteration of this situation is either assumed or denied. And there is the more reason, therefore, for regarding this as the proper place for this discussion because, as was said before, the real significance of the latter is that it aims at realizing in practice the method we have laid down. In the interest of this method we shall, in the present connection, have to lay principal stress on maintaining the special community which we conceive as existing, in typical fashion, between the participants according to the general instructions. According to this special community a certain purpose is to be attained in *co-operation*. Instead of this one of the parties in the present situation proceeds on his own account and frustrates the result of the community. In this way he offends against the principles of *existence*, against that of *respect* or of *participation*, according to circumstances. And yet in proceeding as he does, he would make use of definite arrangements and regulations of the positive law. He can appeal to these and bring about or terminate, as the case may be, a legal transaction. But this manner of carrying out the law creates in the specific case a result which is not in harmony with the law's fundamental purpose of *just co-operation*. The law therefore interrupts the ordinary formalistic course of its commands and determines instead of the former result to enforce that which in the given situation better corresponds to the idea of just law. Accordingly, in the paragraphs cited above, the words "in violation of good faith" may also be rendered thus, *in violation of the aim of the special community as justly carried out in this case*.

A person had sold a slave; but made the transaction subject to the slave previously rendering a satisfactory account to his master — "*si rationes domini computasset arbitrio.*" But he did not take the account from the slave, nor did he release him from it. The Roman lawyers considered the two possibilities. One is to regard the sale as depending upon the subjective pleasure of the seller, in

which case it would be void. The other is to regard the matter of the rendering of account from an objective point of view. They adopted the latter. "Placuit itaque veteribus magis in viri boni arbitrium id collatum videri quam in domini. si igitur rationes potuit accipere nec accepit, vel accepit, fingit autem se non accepisse, *impleta condicio emptionis est* et ex empto venditor conveniri potest" (D. XVIII 1, 7 pr.).

The following case is a still better illustration of our idea. A person bought a library on condition that the Campanian "decuriones" would sell him an appropriate place for the housing of the collection. But then the purchaser of the library failed to take any steps for the acquisition of the place from the Campanians. The condition of the purchase of the library is regarded as fulfilled (D. XVIII 1, 50). A parallel instance occurs frequently at the present time, where government permission being required to engage in a given industry, a person acquires such a business subject to the government granting permission, and then fails to take any further steps or by his conduct makes the obtaining of the permission impossible.

If a person surrenders something to another on condition that the latter should take good care of the donor as long as he lives, he can not justly appeal to the failure of the condition if he himself made their living together impossible by gross excesses, ill-treatment or endangering the life of the caretaker. For it is all the same whether we designate such conduct as a "valid" reason, so that one "can not be presumed" to continue the community, or whether we say that he prevents its realization "in violation of good faith." The essential point is the same — a violation of that which is commanded by the principles of *just law*.

For this reason the application of our legal rules must not be made to depend upon the presence of a bad inten-

tion of a specific nature. "In iure civili receptum est, quotiens per eum, cuius interest, condicionem non impleri, fiat quominus impleatur, perinde haberi, ac si impleta condicio fuisset" (D. L 17, 161). Vangerow, for example, is wrong in wishing to restrict this rule to those cases "in which the prevention of the condition contains an injustice or a *deception*." The important point is simply that in appealing to the non-occurrence or, in the opposite case, to the occurrence of the result, a circumstance arises which is not in harmony with the principles of just law. "Tunc demum pro impleta habetur condicio, cum per eum stat, qui, si impleta esset, debiturus erat" (D. XXXV 1, 81, 1). Thus if a person in debt is given a respite until he obtains a position of a certain kind and in the meantime he gets a good inheritance and gives up the career of an employee altogether, the action for payment is not for this reason denied. "Qui potest facere, ut possit condicioni parere, iam posse videtur" (D. L 17, 174 pr.).

This gives rise, however, in its detailed application to two interesting questions. The occurrence of the conditioning result may take place with the full intent of one of the parties, but he brings it about because the other party furnishes a real ground for it. Thus the rule of BGB. 815 does not hold against the father of the bride who rescinds the betrothal for a "valid" reason and then reclaims from the former bridegroom the things which he formerly gave him for the conclusion of the marriage. For it is not sufficient, as many lawyers have said, that the frustration of the result should not be "against the meaning of the underlying transaction," but the proper thing is that it shall not be *against the principles of just law*. But this is as a matter of fact avoided in the circumstances and procedure of the case last described.

A manufacturer bought a patent on condition that a certain technician should remain at least a year in his service. In a few months he discharged the man himself

for a "valid" reason. — The journeymen employed by a master locksmith suddenly stopped work. The latter collected the premium from the "Employers' Insurance against Strikes" and treated the strikers to a barrel of beer, whereupon they returned to work again under the old terms. The insurance treasury now sued the locksmith for the return of the premium, or at least of as much of it as was still remaining, on the ground that he caused the strike by gross negligence. — A surety undertook the liability for a debt on condition that the woolen goods business recently taken up by him would progress favorably to such an extent that he would be able to pay his liability from the income thereof. Soon thereafter he gave up the business for good reasons.

In such doubtful cases the question arises, if we wish to apply the point of view above indicated, Upon whom lies the burden of proof in respect to the justification of the prevention of the result? Now we are dealing here with a certain correction of the law which itself undertakes against certain of its consequences. In the ordinary course of events a legal transaction would originate or terminate as a result of the occurrence or non-occurrence of a condition; or a reclamation could be made valid in case of unjustified enrichment. In opposition to this the party to whose disadvantage this would work maintains that by way of exception the result in question must not take place because it was effected by the other party "in violation of good faith." Accordingly in such cases he has the burden of proof who has to maintain violation of good faith in order to be absolved from the general consequences. In practice it will often be found appropriate to allow the one who prevented the result to give a counter proof, with supplementary material, that he was *not guilty of unjust procedure*. But the essential basis for determining the burden of proof is, naturally, not thereby affected.

§ 5. *Termination according to objective judgment.* — In legal intercourse it often happens that the *existence* of a right is left to the decision of one of the parties concerned or even to that of a third person. This may refer to the *origin* as well as the *termination* of the relation in question. Usually, however, the latter is the case. And this theory may find its place in this connection for the same reason as that given for the preceding section.

According to an old classification there are three possibilities here. 1. Determination according to one's own *pleasure*; 2. Dependence upon an *uncertain circumstance*, perhaps also upon an act of the person under obligation; 3. Decision according to an *objectively justified judgment*. The first two have often been treated in the theory of "conditions," in particular in connection with "*condicio si voluerim*"; and may in general be omitted in this connection. Apart from the comprehensive view that is furnished by naming them, I have only one other question to add from the standpoint of our present investigations.

It may easily happen for example that the termination of a right must be certainly assumed according to a positive rule of law, but that it will not stand the test of a consideration according to just principles. In the conditions of a fire insurance there were definite obligations laid down of the insured, the neglect of which was to effect the immediate termination of the insurance. It was provided among other things that the insured must give notice to the company before undertaking any dangerous occupation in his house in order that new arrangements might be made. And as an illustration it was added in the regulations that the manufacture of cigars belonged to those dangerous occupations. Nevertheless a person who had taken out insurance fitted out a room for the making of cigars without giving the required notice. Then a fire broke out on the premises. But the room in which the

cigars were made remained untouched. The company claimed that their obligations had terminated. This objection was regarded by the court as valid. The Roman law that was decisive at that time said indeed, "Qui aequitate defensionis infringere actionem potest, doli exceptione tutus est" (D. XLIV 4, 12). But the judicial practice of the common law had refused to take up and carry out generally the idea of Papinianus expressed there. And according to the law now in force it is certain that such a doubt as might be derived from the fragment cited seems no longer permissible.

According to our laws the determinations of a contract concerning the *existence* of an obligatory relation are not treated in the same way as those that have to do with its *execution*. For the latter we generally apply the rule of BGB. 242 discussed above. For the former, on the other hand, the "lex contractus" is not merely an attempt of *just* law, which may have to yield in a specific case to *lenient* law. The truth is rather this, that so far as the transaction was originally within the limits of freedom of contract and there was no occasion for terminating it later on account of a "valid" reason, the question of its existence is to be decided solely by the technical law as it applies to the transaction in question. If in a given case this leads to a result that is not just, there is room for *grace* on the part of the one deriving advantage from the positive rule (p. 111). But there is no *compulsion* to exercise justice, according to the law as it stands now. This standpoint for example has been deliberately adopted by many life insurance banks; especially in the dispute concerning the contestability of policies in case of suicide of the insured, incorrect statements in the application and other grounds which terminate the contract. The managers of the better insurance companies have as a matter of experience voluntarily and gladly deferred to the requirements of *just law*, but they were not inclined to recognize uncondi-

tionally and without opposition the *right* of the insured to the payment of the full amount of insurance.

Now according to the exposition given here we have in the cases just mentioned merely an example of the contrast between *grace* and *technically formulated law*. But, as was said before, our present law is not in favor of a possible arrangement by which in a given case the observance of *just law* can be *compelled* as a matter of *law*. It chooses, for the present, one only of the means at its disposal; and prefers technical certainty in the average to greater objective justice in special cases. It is presupposed of course that the meaning of the contract in question is in itself clear and distinct, and there is no doubt about its interpretation. For in the latter case, as we know, it has to be carried out in "good faith" (cf. p. 415).

To return now to the threefold division above mentioned, we are more particularly interested here in the third, according to which the termination of an obligation is to depend upon the *objective* judgment of one party or of a third person. For this there are no specially given cases in our positive law. The regulations of the right of succession, which bear some resemblance to them (BGB. 2048; — 2154-2156), are better classed with right *execution* of legal relations according to "fairness" and equity (p. 291).

On the other hand, it often happens that such dependence in the existence of a claim is introduced by means of a transaction. There is an instructive case that came up for judgment before the Supreme Court of the Empire. A poor relation was promised support. The document, which was signed by all the parties concerned, contained among other things the following provision: "The support is made dependent upon the moral conduct of the recipient and the good bringing up of her children; and ceases as soon as her circumstances become such that she or her children are able to earn enough to care for the

support of the family, *this matter to be decided by the family council.*"

In this agreement are well expressed the three possibilities in which an *objective* judgment of the termination of a claim may be used practically. It may concern a *definite single purpose*, which it was intended to realize by means of the claim in question, as for example, the bringing up of children, the care of a sick person, or the support of one who can not earn his living. Secondly, it is possible that the existence of the claim depends upon the *right conduct* of the person entitled *as a whole*. Here we can simply make use of our previous discussion of the concept of "dishonorable or immoral" conduct. Finally, the continued existence of the right may simply be made to depend upon the *objective judgment* of the other party or of a third. If this is the case, then, in a critical situation, we must find out whether by maintaining and continuing the obligatory relation, the person obliged may not become subject to the personal pleasure of the claimant in violation of the principles of *just law*. In verifying this idea in detail by our method, we can follow exactly what has been said before. And we must bear in mind that we must not regard the termination of the claim as justified unless its continuance involves the absolute impossibility of maintaining the principles of just law. In recent debates concerning insurance the question was raised whether the managers or other organs of the company are competent to change the regulations. Take the case for example where the old statute allowed such changes, and the authorities determined that by reason of certain newly arisen facts it was desirable that an old insurance policy should be terminated. As far as can be seen, present judicial practice is preponderatingly inclined to regard the assumed termination as not having taken place. This is objectively justified. Its justification in a given case must be derived from the absence of offences against the

principles of just law. Permissible changes and additions must not be of such a kind that the existence of a properly justified legal relation is interfered with by the judgments of other persons, or that greater duties and wider exclusion are imposed upon the one party. Nor can the mere reservation of possible changes unqualifiedly hold the person who bound himself to such a contract. For the meaning is that the party reserves to himself the right of change or termination if there is an *objective* reason; whether this qualification is specifically expressed or read into the contract in case of doubt. And this, as we said, justifies interference only when it is absolutely impossible to maintain the existing relation in harmony with *just law*. This gives us the proper manner of viewing such cases, and decides likewise where the burden of proof lies. For he who insists on terminating a relation must establish satisfactorily a *just* reason for termination. In default of this, the words of Paulus remain true, "Conditio vero efficax est, quae in constituenda obligatione inseritur, non quae post perfectam eam ponitur" (D. XLIV 7, 44, 2).

CONCLUSION

THE MISSION OF JUST LAW

Education has its purpose in the race as well as in the individual. He who is educated is educated for some object.

LESSING.

CONCLUSION

THE MISSION OF JUST LAW

§ 1. System of social relations. § 2. The theory of social development. § 3. Orthosophy.

§ 1. *System of social relations.* — Our exposition would not be complete without an attempt to indicate the position and significance of just law in philosophy as a whole. For an idea can maintain its permanent and real value only if it is useful as a necessary member in the building up of a fundamental conception of life. Our question therefore is, How does just law respond to this requirement, what is its service and mission in human history, what is the function that has fallen to its lot?

It is clear that in this question also the idea of the justice of a legal volition must be comprehended by itself, and then as a complete thing in itself it must be given its proper place in the unity of the larger and more fundamental conception. This can be done in three ways in rising succession.

1. Just law is the condition of unity in every social consideration. It is the highest universal point in every study of the social life of man.

2. Moreover, it offers the necessary basis for a possible comprehension of social history generally. It leads to the conception of law, which has to be maintained in such a comprehension; and is the only thing that makes it possible to conceive, by means of an absolutely valid method, of social existence as a unitary whole.

3. Finally, just law, in its own peculiar manner, shows us the way to a union with all other endeavors of a funda-

mental character, which aim likewise at *right* consciousness. It does its share therefore in guiding its followers to obtain a firm conception of life.

We shall briefly discuss these three points in the sequel and then return to the first, though we shall be able, in expounding it, to say very little that is really new and has not already been said in the previous discussions of this work or of its predecessors. And yet a brief and comprehensive summary is perhaps justified, and at any rate we can not dispense with it by way of concluding this treatise.

I remind the reader of the systematic relation of the fundamental social concepts. Our subject is the *social* life of men. It presents itself as a *co-operation* of men *united*. In this concept we distinguish between the conditioning elements (the form) and that which is determined by them (the matter). The former represents the rules laid down from without, the latter, the idea of harmonious conduct as such. Within the external norms the *arbitrary* commands have only *subjective* meaning (p. 81), and the *conventional* rules are assigned their conceptual place by the *law* (p. 181). Hence in dealing with the conditioning elements of the social concept we give preference to the *legal*.

This is now the place to take up the unity of legal study, which had to be set aside previously (p. 88). It is part of the foundation of our doctrine that the questions concerning the concept, compulsory character and content of law must first be treated separately. But it is just as clear that we must then strive to unite them again. This, however, must not be done by giving equal logical value to every one of the three questions, but rather in the following way. The *concept* of law is preliminary to the problem of its *compulsory character*, and the latter can be established only as a means to the uniformity of social life. Finally, as the latter is always conditioned by *just legal*

content, this, as the culminating and dominant point, forms the crown of social study in general and offers the place of union for all investigation of a social condition.

Ihering had a correct feeling that a scientific investigation of the law must give it its proper connection with social life generally. Without such a plan, positive law threatens to reduce to a summation of scattered and isolated commands, without any inner connection such as was afforded for a long time by the belief in the real existence of the national soul (p. 116). Therefore the author above mentioned undertook to consider the "interests" and "wants," and to bring them in combination with the system of the law. He also saw its functional side in its influence upon those interests and needs, or conversely he found in "Purpose" the creator of the concrete legal regulations. But he could not in this way realize his aim of solving the problem of the necessary union of law with social life.

The only method employed by Ihering is that of a *generalizing description*. In order to carry it out, he had to think of the legal rules and the "needs of life," as real and distinct objects "mutually acting and reacting upon each other." He was not able in this way to get at the fundamental concepts of social existence and their right systematic relation. In order to do this it is absolutely necessary that external regulation on the one hand and co-operation for the satisfaction of human needs on the other be regarded merely as the *elements* of one and the same object, social life — as *mental elements* which may indeed be separated by way of abstraction, but must not be regarded as having each an empirically distinct and independent existence and exerting an "influence" upon each other. There is no legal norm which does not already indicate a certain mode of co-operation; and in *social* study there is no satisfaction of wants which does not already presuppose an external regulation.

Law is therefore not an independent thing which attaches itself to natural interests or is spontaneously sought out by the latter. So far as *social* consideration is concerned, the only interests, purposes and wants are those which are *socially regulated*. In so far as they have a *natural* existence and can be satisfied *technologically*, they do not become *social* until they are given a place in regulated co-operation. They may indeed exert a change in the manner of this regulated co-operation, but this will always take place within the circle of social life. On the other hand there is no "system of human wants" as independent *social* magnitudes, which may be determined a priori — *concrete* purposes of *absolute* validity! Nor is it permissible as a method to think of "law" as an independent thing selected for the purpose of interfering with those interests and needs. The true relation in the social system is this. The interests and needs must be considered as the *material* elements of the social concept, while the rules of law are its *formal* elements, as was brought out before.

In this way we assign the law its place in the whole of social existence, with which it forms a unit. It is a form which determines harmonious conduct and activity. As *just* in its content it is also the condition of a *good social life* and not a distinct corporeal object of a peculiar kind. This also solves the question of the "Struggle for Law," so often demanded.

The complete carrying out of *positive* law as such can never be in itself an obligatory command of ethical theory. Positive law is only a conditional means, the justification of which is often an open question. Nor can this question be decided by reference to the "personality" of the one positively entitled. For the disregard of his "person" may also be the result of opposition to his merely *subjective* desires. A fixed limit can be found only in the will of the person entitled harmonizing in the

specific situation with the idea of *just law*. And the formula which Ihering was looking for is not the one he gave (that the struggle for law generally is an obligatory command) but the following, — *The will of "just" law is an obligatory command*; but the struggle for positive law, *simply because it exists*, is not by any means a duty.

Law, with its peculiar claim to compulsion, is the formal condition of social regularity. *Just law*, on the other hand, offers the one aim of all social life and work. It is the highest principle that is common to all social thinking and determines all such thinking by the same method.

§ 2. *The theory of social development*. — The second and larger significance that pertains to the idea of *just law* on the whole is shown in the *historical* consideration of social life. This may be done in three ways.

1. *History of external regulation, with technical aim in view*. There is no doubt that in very many cases the *actual* meaning of legal rules and regulations can be determined with certainty only if we know the conditions which gave rise to them. Hence the history of law is a useful means for the understanding of the intention of a positive law. But it also follows from this that this method of investigation pertains to *technical* legal science. It can only serve to make clear what was *actually* intended; but is not calculated to give us a *real* justification of the technical content thus expounded.

2. *History of social arrangements, objectively considered*. In this case history is intended as a "teacher." We like to derive benefit from the fact that the past, as we say, "has already tried its hand at the same problem." If there is to be this helpful instruction, it is evidently necessary in the first place that the given *material* shall coincide in the two cases, and in the second place that we must understand the problem of bringing this material under the same *methodical* treatment. Every one can see that the first can be conceived only in rough outline. There

are too many unavoidable complications; and it is only in a very approximate way and by the omission of many peculiar elements that we can speak of a certain similarity in the problematical material of social questions belonging to times lying far apart. On the other hand the methodical process of working it up, the certainty of leading it to a right end would be the same. For this denotes a formal procedure, for which it is possible to lay down a universal method. It is no other than that which leads to *just law*.

When we referred, therefore, above to the instructive quality of past happenings, we meant this, that we can see how in a certain social situation definite means of assistance were used with or without right success, the latter being measured naturally by whether a *just* result was achieved. This insight will lead us in a similar problem to establish a parallel theory. In speaking of the matter in this way we are therefore merely applying what was said in the first part of this conclusion to a definite situation in social history. But there is nothing added that is new. The method is always the same, namely, that in every social occurrence we must emphasize its unifying subsumption under the concept and will of just law. But we are speaking now of the *particular* social questions, problems and experiences.

3. *History of social existence as a whole, as a theory of social development.* To attack this problem properly it is necessary to consider the question that has so often been asked concerning the *laws of history*. Thus it has been asked whether there are "*historical laws*" and what they are. By history in this connection is meant social history; and the question that is really intended is this, how is it possible properly to conceive and determine by means of an absolutely unitary process the events of human social life as they unroll before us in history. When can we properly say of them that they are comprehended and established as subject to law?

Now it seems that a satisfactory answer has often been blocked by the fact that in social history also the knowledge that has been thought of was that of *cause and effect*. When recent historians have striven for "laws of history," they had in mind mostly *the uniformities of natural occurrences*, and disputed whether these uniformities should be seen in typical mass phenomena or in the observation of specific acts and particular persons. But this does not at all hit the fundamental character of social happening. The peculiar nature of the latter is that it lays down purposes and pursues ends. Social history is a history of purposes.

We must never forget that historical study is *analytic*. Its real peculiarity consists in the fact that it determines systematically a process of thought, the material contents of which it follows up as they appear and proceed in time. But the mere fact that we are concerned here with a definite progress and succession in time is no reason for supposing that the right method to adopt here is that of the origin of phenomena according to cause and effect in the manner of natural science. Nor is the matter changed by the circumstance that all practical verification of ideas of consciousness goes back to the nature and origin of natural objects. The history of music is something quite different from the origin of tones.

Liebig teaches that by continued cultivation of grain the soil gradually loses the nutritive elements necessary for the purpose. This nutritive material must be replaced if the fertility is not to suffer, and this can not be accomplished by allowing all refuse to be carried away into the rivers and the sea. In "confirmation" of this view he cites among other things the fall of the Roman Empire, in which the people did not proceed in this matter as was necessary, and on the other hand the long duration of the Chinese State in which they did observe the principles above mentioned.

But in so far as he brings the two things into *direct* connection, namely, the natural qualities of the soil and the social status of men, and treats them as a uniform sort of material, his method is incorrect. The natural law maintained by him must be proved by itself. Certain particular experiences may then be indeed significant as experiments in natural science, in which we are concerned only with cause and effect. But in that case we must keep to the sphere of natural science. But a social observation as such can not be justly cited as a proof of law in natural phenomena, nor is it possible to prove the correctness of a *social* status from a *causal* knowledge of nature as such. For the former has to do with endeavors and purposes and must therefore confine itself to the question whether a certain means is the right one for a right purpose or not.

Nor does it depend upon our free choice whether we undertake a *causal* or a *finalistic* investigation in this matter, as if the one were as correct as the other. This is what Sombart tried to do recently in a very interesting way. He thinks it is a matter of choice "whether we shall reduce the particular phenomena of social events to ultimate causes or to ultimate purposes." But there are no such things as "*ultimate* causes." This would be a contradiction of the law of causality, according to which every cause must be conceived as being in turn an effect of another cause. Moreover the correct parallel is not that of "causes" and "purposes," but that of *effects* and *purposes*; while the concept corresponding to *cause* is not purpose but *means* (p. 141).

But the point that settles the matter is this. The history of social life is the history of *co-operation*. But this aims essentially and necessarily at the prosecution of purposes; and, what is more, its peculiar characteristic is determined in each case by the conditioning regulation which *intends to effect* a certain manner of conduct and

social life. We are always dealing with the question of *means* that have to be undertaken for certain *ends*.

A *social* study can never get away from this fundamental process of thought. If we think we have to do merely with a process of causal genesis, we are easily liable to commit a radical error. Thus, for example, it has been assumed by the advocates of the materialistic conception of history that the activity of the accoucheur (metaphorically applied to social interference) must be considered solely from the point of view of the law of causality, and yet it has to do ultimately with the attainment of *ends*. And correspondingly, whenever the historian asks for the "*wherefore*" in events of social history, it means, if we examine it carefully, not "why," but "what for."

Whatever our views may be of the "causes" of the French Revolution, the answer must be based upon the following systematic outline — In what respect were the traditional conditions of society inappropriate as *means* for a just communal life? What particular *aims* arose in its place, and what were the means sought to prosecute those aims? And when the communistic manifesto maintains that history as handed down in writing is the history of "class struggles"; when it declares that all previous social movements were inaugurated "by minorities or in the interest of minorities", and ends with the battle cry of the union of all the proletarians — what is all this except a structure of ideas by the method of endeavors and aims, of *means and purposes*?

We may no doubt sometimes incidentally follow up the origin of a particular *purpose* in its causal genesis, so far as it may be appropriate, and analyze the material employed as *means* with respect to its naturally determined qualities. But nevertheless the *fundamental* direction of our course of thought in this matter must remain a study of purposes and aims. We may perhaps in the exposition of *means*, incidentally and in an auxiliary manner, con-

sider the question of known causes and their effects. But this does not entitle the latter consideration to equal right with that of *finality* in the study of society as if it were a matter of personal choice. On the contrary, every determination which has to do with causality only can be for *social* life preparatory only and incomplete. And on the other hand every investigation of *social* phenomena in respect to their methodical peculiarity leads necessarily (since they are uniform mass phenomena in regulated co-operation) to the discussion of means that have been employed for certain ends of social economy.

For this reason the laws of social life are inevitably different from those of natural phenomena. A social event is, in respect of its content, *in accordance with law* if it is the proper means to an objectively justified end. The concept of law signifies here simply this, that the conscious contents with which we are concerned here must be arranged and directed *in the spirit of a fundamental unity*. This is the only thing that is common to the data of nature and of society. But the fundamental unity itself is different in the two modes of analysis. It is in vain therefore to look for laws of social history in the sense of unities of natural phenomena. For even if the causal genesis of a *means* could be understood more precisely than is mostly the case, I still know nothing so far of the justification through the law of the thing so originating — *i.e. as a "means."* And yet it is just this that the observer of social history would like to make clear, namely, whether a definite mode of co-operation, whether a certain laying down or using and carrying out of a social regulation, was a right means or not. This is the all-important point.

Nor, finally, must we conceive this last problem as divided in the following way, namely, that we first establish the *causal* origin of social acts of will and then apply to these acts the *ethical* judgment. Both of these

considerations are only incidental in our present study and supplementary. When we speak of the law of social existence we refer to the form of social life, that is to the regulation of conduct considered as a means to *right* social living. And similarly every historical consideration of States and peoples and all social events has to do with the *means* of social co-operation, the law of which consists in their agreement with the highest idea of social life.

But it is true that with this possibility we first open the way only to an innumerable mass of particular cases each one of which is determined in its content according to the general law. Even after all this, history offers only what Kant once called in a different connection, a "labyrinth of manifoldness," *i.e.* an indefinitely extending mass of continually increasing specific cases, which may in a given case be objectively fixed and judged, but are, until that is done, without a deeper unity. But it is this unity we are aiming after in seeking for the law of human history. This is made possible in the idea of *development*.

This expression has had the same history as that of law in general. It too has gradually become restricted in a one-sided manner to the idea of the scientific knowledge of nature. And yet it denotes generally the approximation and adaptation of an object to a preconceived purpose. Now this may also apply to a concretely delimited sphere of objects, as for example, especially, when we define, in accordance with a certain principle, a conscious content as a whole and direct our attention to its investigation. In all cases the idea of development is nothing more than a *heuristic maxim*. It is an ideal guidance in the observation of the origin and process of natural phenomena or of the appearance of means and purposes in society. The opposite view would be baseless metaphysic. For it would have to assume again absolutely existing things, a matter existing by itself and its motions appearing as unconditioned twitchings. But if instead of such a vague

and confused conception we maintain that it is always a question of the content of one's own consciousness; that the problem is to objectify this consciousness in the fundamental spheres of knowledge, volition and artistic creation; and that the main point of our concern is clear reflection on the principles and methods to be applied in this process of objectification — if we see this, then the concept of development and its utilization in the social sphere will lose all its difficulty. For it simply represents a peculiar and fundamental method of conceiving in unitary fashion the historical process of social life. The idea of purpose, also, is not a something existing by itself outside of us and attaching itself to phenomena. It denotes a fundamental direction for the content of our consciousness. And therefore its utilization in the analysis of *development* can not contain anything methodically different.

If one asks therefore, "What do we learn from the principles of the theory of descent concerning the inner political development and legislation of States?" our answer is, If your purpose is to get propositions containing *specific material content*, we learn *nothing*. For that basis pertains to mere *physical* knowledge and has to do only with the unitary conception of *perceptions*; whereas politics and legislation has to do with the treatment of *social* life, and aims, in its peculiar method, at a right formation of the *will*. The two therefore stand under fundamentally different general conditions. Every content of consciousness belongs to a methodically different field of investigation according as it belongs to the one or the other. To speak of applying directly the content of the theory of descent to a study of human *society* is absurd.

The only thing that can be learned from the results of the physical investigation in question is the use of the general idea of *development*; not in the vague sense,

naturally, of mere movement and temporal succession, but in the signification above mentioned of a perfection, approximating in a continuous progress to an ideal aim. The disciplines of natural science have the right to claim that they were the first to establish and carry out this maxim of observation and judgment in their problem. Now the thing to do is to utilize in an independent manner for social investigation the concept of development as just described. Accordingly the theory of social development is the conception of social history as the progress of humanity toward the better and the more just.

This again must not be considered as a mechanical process. It aims, as we have sufficiently shown, at the use of right means for specific right purposes. And it expresses in a word the idea that this right use of means is becoming more and more frequent and assured.

But neither must it be understood as an assertion of actual occurrence. This would be nothing else than mere defective prophecy. And it could not even profess to be a direct continuation of previous experience. We wish to avoid the error of the period of the Revolution, in which they expected progress to a good society as a sure fact, and believed they could prove it actually taking place. But we must also avoid the mistake of the social materialists, who regard social history as a development of natural organisms, and with this fundamental fault in method can not make any use of the idea of *social development*. We, however, do not regard this idea as giving information of something that has actually happened, nor as a picture of events that are to come and that may perhaps be determined already now.

Who will be so bold as to presume to say definitely how a man seen in his youth will "develop" in the future? Whether his "development" will lead to good or to evil I know not. This, however, I can know, that no judgment concerning such *development* can be properly made —

whether as desire, as hope or fear, or in later retrospect — unless the course of his volition and the process of his activity are measured and judged by the following standard, namely, whether he approximated and adapted himself more or less to the fixed purpose of his being and his duty. And on the other hand it is certain that by maintaining such an aim, and in this way alone, is it possible and permissible to regard the whole of his life as a development and thus as a unity.

And as it is with a single person so it is with the life of the community. No one can justly maintain and say how the history of man will proceed. And yet it is possible and it is justifiable to apply the idea of *development* to the *whole* of humanity in its *social* aspect, and to do this, as we said before, in the sense of a *heuristic maxim*.

According to this the various social means to a progress for the better are inserted in a unitary process of thought. No matter what particular relapses there may be, due to error in specific acts or to the continued absorption of backward peoples, classes and individuals — for the *whole* of social volition the maxim of a progressive study remains unshaken. And referring as it does in this way to the *whole* of society, it creates for this sphere a unity in thought. But as a principle of discovery it allows us also to regard any section of social volition as an attempt to enter the continuous process of progressive rectification and find a harmonious place therein. This makes possible a new and supplementary mode of viewing historical events.

The *formal* justification of this is given by the fact that the idea of *development* in the above mentioned sense represents the only condition under which the unity of the social life of humanity can be conceived. And the *real* justification follows from the fact that in the concept of community is already implied the aim of an objectively just social life which can not be removed without contra-

diction. Now this aim of a good community can not exist except on the condition of *just law*. Our concept is therefore shown to be the fundamental element for the problem of understanding the whole of social history as a unity.

§ 3. *Orthosophy*. — The theory of social development does not yet lead to the absolute resting point after which man feels and strives. For as development of *society*, it remains restricted to a definite object. For while it embraces the *whole* of society as it appears in history, it must, in the interest of clearness and precision, always keep in mind its differentiation from other things.

This systematic delimitation is the more noticeable because we must keep distinct the progress toward *just law* from the progress toward *ethical intention*. And the unity of complete purpose is only constituted by the development of the two tendencies again united into one. Then, to be sure, a particular error appears as a point of transition to the more perfect, the more just and the better volition. And every individual must be given his place in the whole of humanity; his own perfection serves the progress of the latter. But it does so again in the development of *volition* as a fundamental tendency of consciousness. And it presses on further to a final end, which in its unity no longer sees anything else *besides* itself to the right or the left, embracing *all* in itself. But the idea of development as such can not assist us in this further process.

If, however, we wish to make the attempt, it would be necessary to enlarge the idea in such a way that it may be fitted as a formal concept to embrace the universality of all being. Now "development," as such a concept, merely denotes continuously increasing adaptation to a fixed aim. We have thus the idea of an *aim* as an independent thing and distinct from the specific approximation to it. But if we ask concerning the *fundamental method* of development in itself, it is impossible to separate

it from the *specific objects*, whose increasing adaptation we are considering. The development of *natural phenomena* is the determination of a conceived perfection by means of *causes and effects*. The development of *social happenings* is the idea of a progress of *means and ends*. Hence if we have nothing else than the concept of "development," those two (and the products of artistic creation besides) never again combine. The only thing that is common is merely the idea of a progressive adaptation to an end. But the peculiar character of the latter remains inexorably distinct, and similarly the methods of carrying out the perfection in the directions indicated are inevitably different.

And reflective thought can scarcely be satisfied with this. It always strives to harmonize the two separate kingdoms of *cause* and of *purpose*, and to embrace them both in one unitary conception. And this not merely from an external need of unity, but because each of these alone does not lead to a completely satisfactory conclusion. Each points to the other and awaits its assistance and co-operation.

Mere *physical becoming* is confused and without a guide. And no matter how violently one may force himself to see nothing but natural causation and blind himself to the elemental pressure of the idea of *purpose*, he can not help bringing it again, as we have seen, into his investigation in the concept of "development." And he will never be disposed to erase out of his consciousness the firm *will* to truth and the noble *aim* of scientific knowledge of nature. Thus without the assistance of volition and its laws there can be no satisfactory prospect either of a correct science of experience or of its proper practical utilization in the right interest of mankind.

The laws of *purpose* are again, indeed, independent of the actual result in a specific case. The objective judgment concerning the rightness of certain aims and en-

deavors is not as such affected by becoming and actualization. But nevertheless it refers to something that is to be and to be realized in accordance therewith. And although the objective justification of this content of consciousness exists by itself, nevertheless we can understand the impulse and the desire to be able to form a picture of the manner of carrying it out and of forming the objects in the spirit of the fundamental law of purpose.

Poor indeed is the epoch which values only one of these two domains; and the poorest is that which desires to have nothing to do with anything but natural events. It does not cultivate the ground from which it could get a rich harvest; and serves submissively as a slave where it is in a position to command. In vain does it expect its devotion to the *beautiful* to give it the desired freedom. For whatever art may furnish for the elevation and joy of man can serve only as a *supplementation*; can be only that which is obvious, and which people say of it, namely, an ornament of life, but not its foundation and aim. Embellishment is not completion. The value and destiny of human existence is not measured by it.

Thus in the ever pressing questions of our thought there is no fixed and highest point of support except in the idea of an *ultimate, all-embracing unity*, before whose absolute existence even the laws of human knowledge, volition and artistic formation appear as something specific and particular — everywhere accompanied by a reference to that infinite existence. What we call "*Weltanschauung*" is precisely every man's attitude to this uniform rule of the *universal unity*. All particular things must be brought before it for determination, must show themselves in its light, mediated only by the laws governing the various fundamental directions of consciousness.

But on the other hand the ideal thought of the highest unity of being is also based upon the *laws* just mentioned. The only sure way of gaining that thought is by means of

the clear method of *right* contents of consciousness. It is the continuation of the doctrine of *justice* in all its applications. For its purpose is to unite them all under its rule. Thus its exposition and verification everywhere presuppose the *knowledge of justice* as a fundamental method. And we may designate the fundamental conception thus arising by the name of *orthosophy*.

It is radically different from metaphysical undertakings of former times. The questions of "original grounds," of the "explanation of the world," of the "ultimate causes of things," and so on, are as such always unclear and confused. And they remain so especially in the oft attempted application of them to the problems of law and society.

On the other hand we can not admit that the epistemological foundation of a "Weltanschauung" is systematically distinct from the Weltanschauung itself, so that fundamental emphasis upon the necessity of the former excludes the carrying out of the latter. The contrary is the case. To be sure, it would be doing a great deal if the fundamental criticism of our knowledge and the exposition of the universal elements conditioning it prevented defective dogmatism and dilettanteism in philosophizing, on the one hand, and kept us from premature or exclusive practice, on the other. We are not yet so far advanced that we can afford to devote ourselves *exclusively* to the trial of particular cases, without resorting conscientiously, again and again, to the test of the method of justice. And this is least the case in the social sciences. But even if this were not so, still epistemological investigation must have the further and greater problem, to pave the way to attaining, as is required from time to time, a new and a unitary conception of life; not in opposition to the latter, but precisely as its foundation.

If we now apply this consideration to the last function of the theory here treated, we shall find that, in the

problem now under discussion, *just law* is no longer the *determining condition*, as it is in social systematics and in the theory of social development; but it is nevertheless one of the *necessary preliminary steps*. For if one wishes to attain to an ultimate and all-embracing unity of being, he must first have passed through one of the specific domains of consciousness and obtained an insight into its laws. Not until he has done this and arrived at the meeting point of the various kinds of *justice*, can he begin to proceed in search of the distant unitary goal.

The latter is frequently regarded as something that follows upon the investigation of nature. And this may very well be if the person investigating the problem of "the world" makes sure of the kingdom of *purposes* and their laws in addition to the kingdom of *phenomena*. But it may be more urgent as well as more harmonious to make volition and its fundamental law the starting point for an excursion into the great world. For it is easy to see that in following that path which has to be traversed by a plan peculiar to it, one takes with him as authoritative guides memories of a *materially conditioned nature*. Now all direct transposition of limited though systematically determined objects into the world of infinity only reflects the progressive flight of thought. And here there is no doubt (there are indications to this effect) that to start from the mere observation of natural phenomena easily leads one to see in the ideal kingdom also, of which he wishes to make sure, at bottom nothing else than a certain reflection of the conditioned nature that surrounds us. And not only defenders, but opponents also of the plan just considered have proceeded in similar fashion.

Volition, however, and its law, its purposes and their real justification are less open to such danger. It is safer therefore for him who has an impulse to understand *the all*, to make his start and to get his equipment from this sphere. To offer him a hand, to help and advantageously

to guide him — is the last function of our theory, and an aim of *just law*.

Here is the boundary stone of its limits. He who seeks for the ultimate and fundamental conception, leaves these limits behind him. Something different and greater will now fill the spectator's thoughts and reflections, something new will meet his vision. Yet in taking leave let him once more direct his glance to, and think of, that land in which he found the path and the means for the further journey — namely, *of the theory of just law*.

APPENDIXES

I. THE CRITICAL SYSTEM OF
R. STAMMLER

By FRANÇOIS GENY

II. STAMMLER AND HIS CRITICS

By JOHN C. H. WU

APPENDIX I

THE CRITICAL SYSTEM (IDEALISTIC AND FORMAL) OF R. STAMMLER *

By FRANÇOIS GENY **

Summary: 1. The philosophic and juristic work of R. Stammler. 2. Successive development of his thought in the philosophy of law. 3. The particular point of view from which the work of Stammler is treated here.

I. 4. General philosophical tendencies of Stammler. 5. The preliminary ideas of Stammler on law. 6. Positions taken by Stammler in the general problem of juristic method. 7. The general idea of "just law" according to Stammler. 8. Stammler's attitude to the principal movements of legal thought.

II. 9. Fundamental idea and principles of "just law." 10. Typical model and means of realization of "just law." 11. Practical application of the doctrine of "just law." Problem of the freedom of contract. 12. General observations in elucidation of the problem. Prohibitions of certain contracts by law. 13. Limits on the freedom of contract proceeding from "just law" (through the notion of "good morals"). 14. Summary of the doctrine of "just law" according to Stammler.

III. 15. Criticism of the doctrine of Stammler — its merits. 16. Defects and insufficiencies of the doctrine. 17. Attempts to rectify it. Concluding remarks on the scientific work of Stammler.

1. The work of R. Stammler represents without doubt the most considerable monument of the philosophy of law that has been raised by the last generation of German jurists. And, not to speak of popularity, which will come

[* The article translated here forms chapter six (XI) of *François Geny*, "Science et Technique en droit privé positif," II, *Seconde Partie*, Paris, 1915, pp. 127-190. Other extracts from this author's work have appeared already in Volume IX of the present Series, entitled "The Science of Legal Method."]

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to him very slowly by reason of the extremely abstract character of his thought, and the purely logical form of his presentation, a form which scarcely lays hold of reality, and keeps the mind continually in the higher regions, there seems to be no doubt that his importance merits a place beside the great works of Savigny, Ihering and Kohler.

This work, however, is far from having obtained in France the recognition which it deserves.¹ Stammler is in fact hardly known among us except as the author of the striking formula, "natural law with variable content,"² a formula which expresses only a very small result of an infinitely rich doctrine, which has the misleading aspect of a clear idea beneath an empty profundity, and which, even such as it is, in order to be understood, must be placed in its proper position in the entire development of his thought, of which it is only, so to speak, a mnemonic summary. The philosophic construction of the thinker of Halle must be regarded from a larger point of view. His compatriots were not mistaken in their opinion of him. They recognized that the works of Stammler, by a series of judgments of new value, aim to displace the traditional axis of the juristic system. Nevertheless, preoccupied entirely with the position they should take toward the general tendency of his bold synthesis, they have often neglected to get a clear idea of its characteristic aspects.³

¹ It has however been brilliantly described by *R. Saleilles* (*École historique et droit naturel*), in *Revue trimestrielle de droit civil*, 1902, vol. I, p. 80, note 1, p. 92, pp. 96-97, p. 99. Add especially *R. Saleilles*, "De la déclaration de volonté," Paris, 1901, pp. 197-204, p. 228. See also, *J. Charmont*, "La renaissance du droit naturel," Montpellier and Paris, 1910, pp. 167-173.

² *R. Stammler*, "Wirtschaft und Recht nach der materialistischen Geschichtsauffassung," 2 A. Leipzig, 1906, p. 181 (§ 33); cf. 1 A. Leipzig, 1896, p. 185.

³ See, for example, *G. Simmel*, "Zur Methodik der Sozialwissenschaft," in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich* (of *G. Schmoller*), 1896, XX, pp. 575-585 [pp. 227-237 of the second Heft]. *Staffel*, "Ueber Stammlers 'Lehre vom richtigen Recht'" in *Iherings Jahrbücher für die Dog-*

And we can scarcely find, even in German literature, an exposition of Stammler, more or less complete and purely objective, in which the critic strives principally to pick out all the fundamental ideas of the author and, passing them through the crucible of his own thought, to give them a design and a color which will make them more easily accessible to all minds.¹

This is the kind of effort I wish to make here, at the same time bearing in mind the limits which are imposed upon me by the proper object of this part of my work, specially devoted as it is to the scientific elaboration of the law. I shall therefore leave aside the works of Stammler relating to positive law, theoretical² as well as practical,³ which by their depth, their variety and their understanding of concrete life, bear testimony to the great resources of this

matik des bürgerlichen Rechts, 1906, vol. L, zweite Folge, vol. XIV, pp. 301-322. *Max Weber*, "R. Stammler's 'Ueberwindung' der materialistischen Geschichtsauffassung," in *Archiv für Sozialwissenschaft*, 1907, vol. XXIV, N. F. vol. VI, pp. 94-151. *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," Berlin und Leipzig, 1909.

¹ See, however, *G. Fraenkel*, "Die Kritische Rechtsphilosophie bei Fries und bei Stammler," Göttingen, 1912, A, I, §§ 2-12, pp. 9-26; cf. §§ 17-19, pp. 32-37 (A, II). And for the doctrine of "just law," *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, § 7, pp. 112-124.

² The principal ones will be described later, pp. 496-501 (No. 2). Add among others, "Darstellung der strafrechtlichen Bedeutung des Nothstandes unter Berücksichtigung der Quellen des früheren gemeinen Rechts und der modernen Gesetzgebungen, namentlich des Strafgesetzbuches für das deutsche Reich," Erlangen, 1878. "Der Niessbrauch an Forderungen," Erlangen, 1880. "Die Einrede aus dem Rechte eines dritten," Halle, 1900. "Unbestimmtheit des Rechtssubjektes," Giessen, 1907.

³ I will cite especially, "Praktische Pandektenübungen für Anfänger," Leipzig 1 A., 1893; 2 A., 1896. "Praktische Institutionenübungen für Anfänger," Leipzig, 1896, changed in the two following editions to "Aufgaben aus dem römischen Recht," Leipzig, 1901, 1910. "Praktikum des bürgerlichen Rechts für Vorgerücktere," Leipzig, 1 A., 1898, 2 A., 1903. "Übungen im bürgerlichen Recht für Anfänger," Leipzig, vol. I, 1898, 1902; vol. II, 1903; new edition in one volume, 1909. See also, "Das Recht der Schuldverhältnisse in seinen allgemeinen Lehren," Berlin 1897; and the articles "Recht" and "Schuldverhältnisse" in "Handwörterbuch der Staatswissenschaften," of *Conrad, Lexis, Elster and Loening*, Jena, Fischer, Zweite Auflage, vol. VI, 1901, pp. 327-341 and 611-632.

distinguished jurist, and will confine myself exclusively to his philosophy of law in order to find out how it explains and works out the data of social nature, which are likely to reveal to us the rules of external human conduct, constituting positive law.¹ This result can be attained only by following very closely the complex system of Stammler and the general ideas pervading it throughout.

Bearing this in mind and wishing to maintain faithfully the objective character of this exposition, it will be well to determine in the first place the works which will furnish us the material, so that we may find therein a firm basis for our study, which we will pursue in accordance with the point of view which we have announced.

2. The doctrine of Stammler in relation to philosophy of law is developed in a series of works which it is interesting to follow chronologically and to summarize successively in the same order, because we see there an idea, at first somewhat uncertain and almost confused in its first announcement, gradually becoming conscious of itself, elucidating and purifying itself by its own effort in two capital works, then expressing itself with a surprising clearness and fullness in the form of a substantial summary intended for the great public, and finally — without prejudice, however, to the future — finding expression again, more emphatic and more powerful, in a masterly synthesis, intended, it seems, to impose the work upon the learned world by pointing out its essential coherence.

In fact if we have regard to those of his scientific productions which have constituted *ex professo* Stammler's system of the philosophy of law we shall find that they consist of five principal works of unequal extent.²

¹ See *Fr. Geny*, "Science et Technique en droit privé positif," I, Paris, 1914, no. 16, pp. 47-52.

² I omit certain small works which merely aim at a popularization of the theory, thus, "Die Gesetzmässigkeit in Rechtsordnung und Volkswirtschaft" ("Vortrag gehalten in der Gehe-Stiftung zu Dresden am 15 Februar, 1902"), Dresden, 1902, 27 pp.

First, a brochure published in 1888 on the occasion of the fiftieth anniversary of Windscheid's doctorate, under the title, "Ueber die Methode der geschichtlichen Rechtstheorie" (Concerning the Method of the Historical Theory of Law).¹ Here we have a preliminary skirmish, so to speak, in which beneath the appearance of a very personal examination of the methodological theories of the historical school of law, Stammler gives us a glimpse, in its essential outlines, of the critical point of view, which he is to accentuate and refine in the sequel.

Second. Eight years later (1896) there appeared in its first edition a considerable work, "Wirtschaft und Recht nach der materialistischen Geschichtsauffassung" (Economy and Law According to the Materialistic Conception of History),² a work permeated through and through with the spirit of philosophic originality and power. On the pretext of writing a sharp critique of the famous theory of Marx and Engels, the author investigates a science which puts at the basis of social investigation principles analogous to those fundamental principles which are consecrated by success in the other disciplines, and ends by subjecting society to an indispensable regularity of laws ("Gesetzmässigkeit"). In this book, which is extremely full and sometimes brimming over, there is an effervescence of ideas, still somewhat confused, which concern two important problems of social life. We already see emerging some important conceptions, for example, the distinction between matter and form explaining the separation between "Wirtschaft" and "Recht"; the combination of the one with the other by virtue of social monism; the idea of natural law with variable content; finality as directly opposed to causality, the former ruling men in society and ending with social teleology or

¹ Published in "Festgabe zu Bernhard Windscheids fünfzigjährigem Doktorjubiläum," Halle a. S., Max Niemeyer, 1889, pp. 1-63.

² Eine sozialphilosophische Untersuchung," Leipzig, Veit & Co., 1st ed., 1896, 668 pp.; 2nd ed., 1906, 702 pp.; 3d ed., 1914.

nomology; finally, social idealism, which tends essentially to harmonize a "community of men with free volition." The whole is erected into a dogmatic system, superior to the contingencies of history, and permeated by a constant effort to separate the notion of law from analogous notions (conventional rules, customs, arbitrary commands) and to lead to the doctrine of "just law," which is here merely indicated as eminently desirable.

Third. To the constitution of this doctrine of "just law" is devoted the work, of capital importance in my estimation, entitled, "Die Lehre von dem richtigen Rechte" (The Theory of Just Law), and published in 1902.¹ Here all those ideas which were formerly in a condition of uncertain germination, appear full blown, broadly expanded, and presented with a systematic regularity in an impeccable frame. The introduction begins by distinguishing two kinds of theory about the law. One is technical, and pursues the knowledge of juristic organization as a sort of end in itself, following the various forms in which the established law presents itself. The second is theoretical, and considers the law in a larger manner, as a means in the service of human ends. Technique is indeed indispensable to life, nay more it furthers the proper object of theory; nevertheless the latter surpasses it by its higher aims which make it tend directly to "just law." Having laid down this distinction, he proceeds in the first book to make clear the concept of "just law" by comparing it with established law ("gesetztes Recht"), moral doctrine ("sittliche Lehre"), natural law ("Naturrecht"), grace ("Gnade"), and opposing to it, under the name of "insufficiently analyzed conception of law" ("ungeprüfte Rechtsauffassung"), the instinctive, romantic or tendencious systems, which claim to establish the law on natural juristic sentiment ("das

¹ Published by J. Guttentag, Berlin. [Translated in the present volume.]

natürliche Rechtsgefühl"), on the feeling of law in the minds of the people ("Rechtsempfinden der Volkseelen"), on the dominant conceptions in a juristic community ("die in einer Rechtsgemeinschaft herrschenden Anschauungen"), on the morality of classes ("die Klassenmoral"), on the free estimation of the judge ("das freie Ermessen des Richters"). Having established the idea of "just law" he undertakes in the second book to sketch its method, by which he separates those elements in a juristic content which have the attribute of formal generality, and in this way conceives, in the domain of philosophy, the law of the regularity of ends ("die Gesetzmässigkeit der Zwecke"). Here we must say in the first place that the idea of "just law" is found neither in freedom or equality, nor in wellbeing and happiness, but in the social ideal, which is realized in "a community of men with free volition." In order to apply this social ideal, it is necessary to separate the principles of "just law" from the chief aims of the individual and society. But by themselves these principles would be functioning in a vacuum. In order to make them efficient it is necessary to know the matter of "just law," which is given historically and consists entirely in the economy of social relations. Add to this the various means of "just law" as shown in the various tendencies of juristic precepts, and nothing else will remain to complete the method except to represent to oneself a model of "just law" having its basis in the idea of a particular community among persons whose relations have to be regulated by law, having regard to the idea of your fellowman who dominates these relations and to the variety of typical services or duties which may be imposed on each one. By following rigorously (in general, at least) the method so defined, the author, in the third book, makes practical use of "just law" in a series of applications, judiciously grouped and finely developed, exhibiting the whole

positive and concrete value of his effort. Finally, under the concluding caption, *Mission of Just Law*, he seeks to connect his system with an original conception of evolution, and to embrace it in the frame of a general philosophy.

Fourth. The system, thus analytically constructed, was in danger of losing its unity beneath the exuberance of the rich and numerous points of view which it presented. A sort of panoramic summary was required to condense the complete and minute details of the exposition around a few leading ideas. Stammler found occasion to do this in collaborating on the volume of the P. Hinneberg collection ("Die Kultur der Gegenwart, ihre Entwicklung und ihre Ziele"), devoted to the systematic science of law ("Systematische Rechtswissenschaft"), which appeared in 1906. Under the title, "Essence of law and of the Science of law" ("Wesen des Rechtes und der Rechtswissenschaft"), Stammler himself presented to the world an extremely succinct, precise, firm and exact outline of his whole philosophy of law, and completed it further by some views on the future of the principal fields of general activity open to lawyers.¹

Fifth. A few years later, in 1911, he took up again, in a larger and more original form, the idea of a definitive synthesis that should be the crown and perfection of his whole scientific work. This was the object of his masterly work on the theory of the science of law ("Theorie der Rechtswissenschaft").² Addressing himself, it seems, to the initiated, and especially to his opponents in order to

¹ "Die Kultur der Gegenwart," Teil II, Abteilung VIII. "Systematische Rechtswissenschaft," Berlin und Leipzig, 1906: "Wesen des Rechtes und der Rechtswissenschaft," pp. I-LIX. "Die Zukunftsaufgaben des Rechtes und der Rechtswissenschaft," pp. 495-507.

² Halle a. S., Buchhandlung des Waisenhauses, 1911. See a summary and criticism of this book by F. Berolzheimer, "Eine Rechtswissenschaft der Theorie," in Archiv für Rechts- und Wirtschaftsphilosophie, 1911-1912, vol. V, pp. 311-320.

convince them or to carry them away by the very force of his doctrine, he takes up again, in a new plan and sometimes under a new angle, his main ideas, and follows them up and completes and develops them in a series of sections, devoted to the principal aspects of the law, such as he views them from the height of his own philosophic observatory, as follows: The general concept of law ("Der Begriff des Rechtes"), its actual force ("das Gelten des Rechtes"), its fundamental concepts ("die Kategorien des Rechtes"), its method ("die Methodik des Rechtes"), its system ("das System des Rechtes"), its highest idea ("die Idee des Rechtes"), its technic ("die Technik des Rechtes"), its practical application ("die Praxis des Rechtes"), its history ("die Geschichte des Rechtes"). And to every problem, brought into relief under these titles, he endeavors to give, with trenchant precision, the marks of abstraction and formal generality, which appear to be, in his opinion, the ideal of intellectual representation. If it is true that this work is perhaps most characteristic of the peculiar talent and, so to speak, of the scientific idiosyncrasy of Stammler, it seems, for that very reason, less suitable than any other to make his doctrine acceptable. As by a sort of defiance to his critics, the author in that work pushes to an extreme, even to the point of making it instinctively repulsive to minds that are fond of realities, his dry and barren style, which tends to reduce social life to a skeleton of concepts and words.

3. Accordingly, since I must now try to present Stammler's philosophy of law under its most accessible aspect, from our point of view, to French lawyers, I shall take care not to select as the basis of my exposition, despite its great power, the last work I have just mentioned. I confess that I have neither the courage nor the power to animate this pyramid of abstractions, and I should fear, if I limited myself to summing up a work

entirely in condensed definitions, in subtle distinctions and in formulae for the most part untranslatable, that I would leave my readers nothing but a feeling of the inaccessible and empty.

I hope I shall have a better chance of attaining my object if I direct my effort mainly to the summary outlined by Stammler himself in "Systematische Rechtswissenschaft," in which the intelligible and communicable lines of the theory appear more clearly drawn, and in which the latter is connected more directly with a circle of ideas familiar to every lawyer. Around this centre, the origin of which guarantees its solidity, it will be easy to group complementary explanations which are essential to express the whole scope of Stammler's system, and which I shall borrow from his other general works, mainly from the "Theory of Just Law" ("die Lehre von dem richtigen Rechte"), certain developments of which are particularly interesting for us.¹

In doing this it may very well happen, no doubt, that in trying to relate to the proper object of our investigation, in a manner easily intelligible, the complex and subtle ideas of the author, I shall despoil them of their original color, and distort them somewhat, and that in making concrete (in order to adapt them to a more realistic conception of social life) the abstract formulae, which, such as they are, express in an adequate fashion the essential

¹ To simplify the citations, I shall use the following abbreviations: "Wirtschaft und Recht": "Wirtschaft und Recht nach der materialistischen Geschichtsauffassung," 2 A., Leipzig, 1906; "Richtiges Recht": "Die Lehre von dem richtigen Rechte," Berlin, 1902; [In this translation, "Justice" takes the place of the German title, and the page numbers refer to the present volume. Transl.] "Wesen des Rechtes": "Wesen des Rechtes und der Rechtswissenschaft," in "Die Kultur der Gegenwart," Teil II, Abteilung VIII, "Systematische Rechtswissenschaft," Berlin und Leipzig, 1906, pp. i-lix; "Zukunftsaufgaben des Rechtes": "Die Zukunftsaufgaben des Rechtes und der Rechtswissenschaft," in "Die Kultur der Gegenwart," Teil II, Abteilung VIII. "Systematische Rechtswissenschaft," Berlin und Leipzig, 1906, pp. 495-507; "Theorie": "Theorie der Rechtswissenschaft," Halle a. d. S., 1911.

idealism of his philosophy, I shall run the danger of changing the purity and integrity of the system. To these dangers which lie in wait against every interpreter of the philosophic thoughts of another, and which, it seems, the other critics of Stammler have not been able to avoid, I resign myself in advance. They must be incurred, willy nilly, in order, on the other hand, to hope for the advantage of making the French public receive this eminently personal and powerful doctrine, with all the intellectual sympathy which, it seems to me, it so highly merits.

I intend to follow this purely objective exposition of Stammler's philosophy of law with critical observations which may be suggested to me, and which, while they will fix my personal position regarding Stammler's theory, will at the same time allow the reader to judge the value which it may have for us.

I

4. The proper doctrine of Stammler's philosophy of law centers about the idea of "Richtiges Recht," or "just law," to which is devoted ex professo that one of his works which expresses his thought most clearly from the single point of view that directly interests us here. But this doctrine depends, in some fashion, upon more general intellectual tendencies, some properly philosophic, the others specifically juristic. It is therefore useful to know the nourishing soil, so to speak, from which the vigorous foliage has shot up and developed so as to appear to promise a definitive shelter to our science.

From the philosophic point of view it does not seem doubtful that Stammler is one of those who heard most faithfully the appeal launched in the last third of the nineteenth century, "Zurück zu Kant," and that he has decidedly preferred to the Hegelian metaphysic, so long held in honor among our eastern neighbors, a rationalistic criticism, which dissolves the objective elements of

knowledge by means of a refined analysis, and translates them into formulae capable of mastering reality by confining it within inflexible frames. His rationalism seems to go even beyond that of Kant, in the sense that all his efforts are directed to a systematization of moral and social life, by discovering, for the purpose of its penetration, principles analogous to those which have established so solidly the sciences of nature, and as rigorous as the physical laws subject to causality.

For Stammler, the moral life of men in society is subject to a fundamental regularity ("Gesetzmässigkeit")¹ of unconditioned general value, realising itself in a constant and homogeneous *form*, which must be separated by a sharp criticism of the means of our knowledge, and represented to the mind in appropriate concepts.² For this reason he deliberately rejects all the sentimental inspirations of the practical reason, and prefers to them, in appearance at least, the more rigorous processes of pure reason.³ He even relegates to the background the teachings of history (a *genetic* consideration of things), as furnishing points of support that are only contingent,⁴ and his entire *systematic* construction rests essentially upon rational bases, as is shown especially by his curious conception of social evolution,⁵ by means of which he tries to

¹ Consult on this point R. Stammler, "Die Gesetzmässigkeit in Rechtsordnung und Volkswirtschaft" ("Vortrag gehalten in der Gehe-Stiftung zu Dresden am 15 Februar 1902"), Dresden, 1902.

² "Wirtschaft und Recht," 2nd ed., 1906, § 1, pp. 3-6.

³ "Wesen des Rechtes," p. III. "Wirtschaft und Recht," 2nd ed., 1906, § 1, text and note 1, p. 6; and p. 631.

⁴ "Wirtschaft und Recht," 2nd ed., 1906, p. 7 (§ 1, end), p. 12, p. 105, pp. 214-215, 374-375, 411-414 (§ 75), 462, 528-529, 581. "Justice," pp. 18-20, 28, 80, 136, 137-139, 180. "Wesen des Rechtes," pp. ii-iii. "Zukunftsaufgaben des Rechtes," pp. 501-503. "Theorie," pp. 39-42 (I, 1), pp. 541-545 (VI, 19), 766-770 (IX, 4); cf. pp. 16, 37, 95, 189, 448-450, 517-518, 651, 658, 754, 790. And on the general theory of the history of law, see "Zukunftsaufgaben des Rechtes," pp. 500-505. "Theorie," pp. 751-835 (IX).

⁵ "Justice," pp. 475-485. Cf. on evolution in law, "Wesen des Rechtes," pp. xlv-xlvii; and in history, "Theorie," pp. 797-802 (IX, 10).

erect two ideas suggested to him by "just law" into a general system of philosophy.¹

This does not mean to say, however, that the moral world reduces itself in his mind to a mechanism dominated by an inescapable causality. On the contrary, he removes as completely as possible the notions of cause and effect from the field which he is examining.² He sees nothing in the things of social life except relations of means to ends, and a characteristic trait of the philosophy by which he is inspired, and to which we must call attention is, that it is eminently finalistic.³ The chief question is to discover the supreme end of human society, and to give it that character of formal generality which is the distinctive sign of its value. To this, the main effort of the investigation must be directed.⁴

5. All these philosophical postulates, moreover, can only prepare from a distance the juristic concepts which lead Stammler to "just law."⁵ But before coming to this last point of culmination, it is necessary first to construct the frame which is to contain the essential elements of the complete organization, in which law, properly speaking, finds its place.

Starting therefore with the complex and changing mass of positive laws and written laws which meet our first

¹ "Justice," pp. 485-490 (*Orthosophy*).

² "Wirtschaft und Recht," § 63, pp. 337-345. "Wesen des Rechtes," pp. xviii-xxii.

³ "Wirtschaft und Recht," pp. 355-356, 392-394, 529-531, 589, 616-619. "Justice," pp. 141, 144, 175, 478-480. "Wesen des Rechtes," pp. xiv, xviii-xix, xlv. Add also "Theorie," pp. 49-62 (I, 4-6), 288-311 (IV, 8-11), 324-328 (IV, 15), 606-612 (VII, 11), 759-765 (IX, 3); and besides pp. 70-72, 295, 527, 540, 800, 804.

⁴ See especially in "Wirtschaft und Recht," the whole of book IV, "Soziale Teleologie," pp. 335-474.

⁵ The reader will find a very penetrating exposition of the manner in which the theory of "just law" follows from the philosophy of Stammler, or more exactly, from the Kantian critical philosophy, as revived by the Marburg School (known as the Neo-Kantian) to which Stammler belongs, in *Staffel*, "Ueber Stammler's 'Lehre vom richtigen Recht,'" in Jherings Jahrbücher, 1906, vol. L, N. F., vol. XIV, pp. 301-312.

view of the world, we must establish unity and order therein, and must find a firm landing place from which critical thought can determine and control the brutal confusion of the infinite particularities of social life.¹ With this object in view we must resolve three questions: 1. What is law? 2. How can we justify the constraining force ("der Zwang") which is the characteristic mark of all juristic organization? 3. Under what conditions is the content of a juristic rule really justified?² According to Stammler, these three questions must be considered separately and resolved in the order of their natural sequence. And the common error of the systems of legal philosophy anterior to his own — he reduces them to three principal ones: the theory of the Law of Nature, the historical theory of law, and the materialistic conception of history, and criticises them in succession³ — was that they undertook to combine these three questions in one, and tried to answer them in one formula.⁴

Stammler himself, following his method of analytic precision, tries in the first place to establish the general concept of law, separating it carefully from similar notions.⁵ On the one hand he distinguishes between the *rule* of social life (das Recht) and that which constitutes its basis, namely, the common efforts of men to satisfy their needs, not only material, but of all kinds ("die Wirtschaft"), and relates them to each other as matter to form.⁶ On the other hand, while he regards morality ("die Sittlichkeit") as concerned with purity of intention

¹ "Wesen des Rechtes," p. i. And for further developments, "Theorie," pp. 1-38 (*Einleitung*).

² "Wesen des Rechtes," pp. ii-iii. "Justice," p. 85.

³ "Wesen des Rechtes," pp. iv-xiv.

⁴ "Wesen des Rechtes," pp. xiv-xvi. "Justice," pp. 86-89.

⁵ "Wesen des Rechtes," pp. xvi-xxxi. "Wirtschaft und Recht," § 2, §§ 22-40, §§ 86-91. "Justice," pp. 21-25, 40-71, 167-187.

⁶ "Wesen des Rechtes," pp. xxviii-xxxi. "Wirtschaft und Recht," pp. 7-11 (§ 2), pp. 112-121 (§ 22), pp. 131-233 (§§ 25-40); cf. pp. 303-305. "Justice," pp. 167-187. Cf. "Theorie," pp. 306-311 (IV, 11) and p. 796. Cf. below pp. 513-515 (no. 7), p. 518, text and note 2, p. 519 (no. 8), p. 540 (no. 14), p. 542 (no. 15).

or personal good-will, having in view the perfection of the inner life, law, according to him, comes under the category of those commands which determine external conduct.¹ These commands, in turn, are of various kinds. In particular, there are the conventional rules ("die Konventionalregeln"), or friendly agreements, which bind individuals only to the extent that they consent to be bound.² Then there are arbitrary commands ("die Willkür"), despotic injunctions of purely subjective origin.³ Finally there are customary rules ("die Sitte") — merely a subdivision of the conventional rules, according to Stammler — which approach juristic rules in content, but differ from them in the character of their claim to obedience. For while the former present themselves as a sort of conditional invitation to a given manner of action, law proposes to be formally valid by reason of its being a social will having the power of control in itself.⁴ Finally we have the idea of law coming out clearly as constituting "the regulation of the social life of men, issuing commands out of itself and essentially inviolable."⁵

¹ "Wesen des Rechtes," pp. xx-xxii; cf. p. xxxvi. "Recht und Wirtschaft," p. 99, 101-107 (§ 20), 378-385 (§ 69). "Justice," pp. 40-71. "Theorie," pp. 109, 303-304, 452-454, 457, 492-494.

² "Wesen des Rechtes," p. xxiv. "Wirtschaft und Recht," pp. 121-130 (§§ 23-24), 477-481, 518-519. "Justice," pp. 180-183, 283-284, 360-365, 472. "Theorie," pp. 96, 102, 109, 302, 304, 417, 425, 503-504, 509-510, 707.

³ "Wesen des Rechtes," pp. xxiv-xxvi. "Wirtschaft und Recht," pp. 477-488 (§§ 86-87), 492-496 (§ 89). "Justice," pp. 81-82, 88-89, 99, 472. "Theorie," pp. 107, 128, 159, 170, 255, 304, 417-418, 425, 503-504, 508-509, 614-615, 815.

⁴ "Wesen des Rechtes," pp. xxii-xxiv.

⁵ "Wesen des Rechtes," p. xxviii. And for a more developed analysis of the idea of law, with will as a basis, see "Theorie," Erster Abschnitt, "Der Begriff des Rechtes," pp. 39-113. Add, Zweiter Abschnitt, "Das Gelten des Rechtes," pp. 114-179. See also, on the categories of law, of which we shall have occasion perhaps to speak later (in the third part of this work), *ibid.*, Dritter Abschnitt, "Die Kategorien des Rechtes," pp. 180-262. See also Fünfter Abschnitt, "Das System des Rechtes," pp. 364-436. Add, concerning this notion of law, *R. Stammler* ("Notion et portée de la volonté générale chez Jean Jacques Rousseau") in *Revue de métaphysique et de morale*, 1912, vol. XX, pp. 386-387. And on the idea of law and its function, *ibid.*, pp. 387-388.

Having obtained this idea of law we must next justify the constraining force which is always an essential mark of it. For of what use is it to go further and appreciate the intrinsic justice of juristic rules if, on other grounds, we have to bow before the objections of anarchism and admit that the only really justifiable form of social life is a purely voluntary regulation of common existence, so that all constraint — and constraint is inseparable from the idea of law — is condemned in advance? Hence, after refuting the dynamic theories proposed by the Socialistic school, according to which the autocratic force of the law has become established historically as a necessary product (in the sense of an inescapable causality) of economic relations, by virtue of considerations of a physiological or simply social order, he shows the insufficiency of the teleological explanations proposed hitherto by legal philosophers, explanations which represent juristic constraint as being the indispensable means for maintaining the physical existence of the human race, by putting an end to the “*Bellum omnium contra omnes*,” or, under numerous variations, as being the only efficacious method for assuring the moral life of men.

To all these conceptions he opposes a different one, equally teleological in tendency, based on the fundamental idea of the regularity of social life, supported by a formal rule of general scope, and culminating in the statement that “the juristic will in its proper quality as *imposing its validity out of itself*, appears as the inevitable means for uniting socially *all men imaginable*, and for determining *unconditionally all possible society*.” This determination, which shows the insufficiency of conventional rules, seems to him alone capable of giving a solid theoretical foundation to juristic constraint.¹

¹ “Wesen des Rechtes,” pp. xxxiv–xxxvii. See the developments given to this question in “Wirtschaft und Recht,” 2nd ed., 1906, pp. 514–559 (§§ 92–98). Cf. “Justice,” pp. 17, 23, 25–26, 181, 209. “Theorie,” pp. 98–101 (I, 13) and pp. 494–495 (VI, 10).

Having established this point, it seems that there is nothing else left to do except to attack the intrinsic content of the juristic rules in order to appreciate their value according to certain fundamental conditions. This is precisely the problem of "just law" ("richtiges Recht"), which is the main object of Stammler's studies and in which appear with great prominence his personality and the force of his ideas.

Nevertheless, before summarizing the essential points of his doctrine on this matter, I will attempt to throw some more light on two positions taken by Stammler on the general problem of juristic method, positions which it is important to understand well in order to have a clear idea of the scope that is to be assigned to his conception of "just law" ("richtiges Recht").

6. (a) More than once Stammler differentiates between the theory of law and its technic, and he has devoted the introduction of his great work on "just law" to an ample exposition of this distinction.¹ The technic of the law, according to him, has in view the control of the organization of the law as found in history, making of the knowledge of this organized law a sort of final end, whereas the theory of law sees in juristic rule a means in the service of human ends, a conditioned means which leads to a certain result. According to these views, the former endeavors simply to penetrate to the real sense and content of definite texts or institutions, to comprehend them in a summary view and to present them in systematic order, the latter considers the question whether

¹ "Justice," Introduction, Problem of Just Law, pp. 1-14. Add, "Wesen des Rechtes," p. lii. "Zukunftsaufgaben des Rechtes," pp. 496-500. "Theorie," Siebenter Abschnitt, "Die Technik des Rechtes," pp. 559-652. To avoid all ambiguity it is proper to observe that in other passages of his works Stammler understands by the word "Technik," industrial or agricultural technic. This is the sense in which he uses the word "Technik" most frequently in "Wirtschaft und Recht," 2nd ed., 1906, thus pp. 132, 186, 244, 295, 400, 404, and especially, § 39, "Einfluss des Rechtes auf die Technik," pp. 224-226.

the law, as thus received by tradition, constitutes a just means to a legitimate end.¹ In short, and to express these somewhat general formulae in concrete terms, the technic of the law, as Stammler understands it, confines itself to the minute interpretation and application of the established law, whereas the theory alone rises to an estimation of its value, and judges the established law by reference to a higher type of justice. It is clear that of these two aspects of the general theory of law, it is the second alone that is of direct interest in the philosophy of law. Nevertheless the former too is related to it as a necessary process for the realization of "just law."² Moreover, it seems indeed that besides this somewhat narrow idea of mere technic, Stammler caught a glimpse of a larger idea of artificial means intended to adapt the abstract rules of "just law" to social life. And although he denies that "Zweckmässigkeit," considered as tactics raised to a principle, can take the place of "just law,"³ he nevertheless lays emphasis upon a purely formal law, which sometimes prevails over the fundamentally just law, or is calculated to make the latter more sure, by a sort of concession of pure theory to the exigencies of life.⁴ But it does not seem that he introduced any of this into his personal conception of juristic technic,⁵ and in any case it remains incontestable that all these expedients are, in his mind, absolutely subordinated to the higher conception of "richtiges Recht."

¹ "Justice," pp. 3-5, 7-9, 10, 11 (Introduction). "Zukunftsaufgaben des Rechtes," pp. 497-498. "Theorie," VII, 1. "Theorie und Technik," pp. 559-563.

² "Justice," pp. 11, 13; cf. p. 174. "Theorie," VII, 17. "Geformtes Recht und richtiges Recht," pp. 647-652.

³ "Justice," pp. 175-176. "Theorie," p. 469 (VI, 6).

⁴ "Justice," II, 4, § 3. Actual and Formal Law, pp. 200-206; cf. II, 4, § 4. Consciously Unjust Law, pp. 206-207. "Theorie," pp. 649-65 (VII, 17).

⁵ See, however, "Justice," p. 435. Cf. "Wirtschaft und Recht," 2nd ed., 1906, pp. 161-162. "Theorie," VII, 16. "Lücken im Recht," pp. 641-647 and 651-652 (VII, 17).

(b) The effective importance of this "just law," moreover, depends in turn upon a still more important question, namely, What will be its precise value in the practice of juristic life? That the "just law" must inspire the decisions of the politician, statesman, legislator or administrator, called to fix the limits of the formal law, in order to assure to justice an easy control in concrete social life, there can not be the slightest doubt, and the entire work of Stammler, unless it is to lose all positive significance, implies it absolutely.¹ But how about the interpreter of the law, properly speaking the judge, charged with declaring the law, or the theoretician who lays down the basis for its application — may he, too, draw the principle of his solutions from this typical source of social justice? On this important point, which he does not seem to have examined very closely, and a careful consideration of which no doubt escaped his exclusively theoretical objective,² the ideas of Stammler, though some of his critics have decidedly interpreted him in favor of the widest use of "just law,"³ seem to me to have remained somewhat elusive if not even uncertain. So far as I have been able

¹ See especially, "Justice," I, 1. Just Law and Positive Law, pp. 17-39; II, 4, §§ 1-4, pp. 188-207; III, 2, pp. 300-347. Add "Wesen des Rechtes," p. lix.

² This follows clearly from the subtle and fine conclusion in "Wesen des Rechtes," D. VI, pp. liv-lix ("Die Bedeutung des Rechtes"), which must be read attentively and entirely to get an idea of the author's manner. I call attention to this significant phrase, "The theory of just law has nothing to do with the question of the *actual validity* of a law in general, but only with the quite different subject of its possible *justice*," pp. lvii-lviii; and again, "What the theory of just law means to do is merely *to furnish a method* by means of which we may be able to direct, *in essentially justified fashion*, the particulars of a juristic volition of empirical origin, and according to which one may above all be in a condition, in those individual cases in which the law that is in force directly commands it, to choose for oneself the *just rule* by a process of demonstration that is as sure as possible," p. lvii. Cf. *ibid.* p. xv.

³ See especially, L. Brütt, "Die Kunst der Rechtsanwendung," Berlin, 1907, p. 113, end, p. 118; add § 7, also §§ 8, 10, 11, 12. See also *Staffel* ("Ueber Stammler's 'Lehre vom richtigen Recht'"), in *Jhering's Jahrbücher*, 1906, vol. L, N. F. vol. XIV, p. 310 and pp. 312-314.

to catch his meaning, in my endeavor to discover amidst his hesitations, so far as this was possible, a homogeneous and coherent direction, I would say that he maintains above all the supremacy and independence of formed law ("geformtes Recht") according to the intention of its authors, which alone can guarantee to their precepts their complete technical value.¹ That is why Stammler does not employ with full assurance the suggestions of "just law" for the interpretation of legal rules except when he feels authorized to do so by the express or tacit reference of the legislator.² On the other hand, however, if it happens that the latter has omitted to legislate on a given question of law which actually presents itself — for it is just as inevitable that lacunae should exist in the formulae of established law as it is on the other hand true that these lacunae can not exist in the constitution of positive law taken as a whole³ — it is necessary and legitimate to introduce in such a case the principles of "just law," to complete the insufficient indications of technic.⁴ In other words, if I may try to express still more definitely the reply Stammler would make to this important question, I would say, reproducing almost a distinction made by himself, "Two things are possible. Either the legislator positively refers to equity (in the large sense of the word), or he is silent. In the first case, those interested must *ab initio* regulate the situation in question according to the principles of "just law." In the second case, on the other hand, one must first see if it is not possible to find a decision in the meaning of the concretely organized content of a *given law*, and only in case the result is

¹ "Justice," pp. 26-27; 80-85. Cf. "Wesen des Rechtes," pp. lviii-lix.

² "Justice," pp. 240-241, and Part Three, Practice of Just Law, pp. 236-467 *passim*. Cf. "Wesen des Rechtes," pp. lv-lvi.

³ "Theorie," pp. 641, 642, 651-652.

⁴ "Justice," II, 4, § 5. Lacunae in the Law, pp. 207-210, for the principle; and for certain applications, p. 438, p. 441, pp. 442-443. Cf. "Wesen des Rechtes," pp. liii, lvii, lix.

negative does it become necessary to solve the problem according to the fundamental principles of juristic organization in itself."¹ More briefly still, and perhaps more clearly, "just law" may be legitimately introduced only when the established law has failed to formulate any direction, however vague.²

7. Now what is this "just law," which represents the kernel, as it were, and seems to express the whole substance of juristic organization? To explain it Stammler adopts the Aristotelian distinction of matter and form, which he expounds in his own way, not without entirely changing perhaps the purely ontological character of the Greek philosopher's doctrine.³

Every particular content of our consciousness presents itself to us as a composite of essential parts, different but closely united. These essential parts, which are not identical one with the other, are divided into two classes. The first contains the permanent elements, which are always the same under different representations of the mind. The second includes elements changeable in their essence, which are modified in the course of evolution. On the one hand, therefore, we have conditioning elements, which are *the form* of the concept: on the other, we have elements determined by the first, and constituting *the matter* of the concept. The separation of these two

¹ "Justice," p. 210. Add, pp. 230-235.

² This conclusion, still somewhat vague, is the only one that I can allow myself to formulate, in view of the new developments presented in "Theorie," VIII, D. "Das anzuwendende Recht," pp. 714-750; cf. VII, 16, "Lücken im Rechte," and 17, "Geformtes Recht und richtiges Recht," pp. 641-652.

³ See especially, "Wirtschaft und Recht," 2nd ed., 1906, § 22. "Form und Materie (des sozialen Lebens)," pp. 112-121. "Justice," II, 3, § 1. Matter and Form (of Law), pp. 167-169. "Theorie," Einleitung, 3, "Form und Stoff der Rechtsgedanken," pp. 6-10, then, p. 24, 26, 36, 272, 279, 351, 517, 757, 800. This distinction had already been described before, especially by *H. Bergbohm*, "Jurisprudenz und Rechtsphilosophie," I Band, Einleitung, Abhandlung I. "Das Naturrecht der Gegenwart," Leipzig, 1892, pp. 543-544. This last author, however, gives the distinction a different scope, and, on the whole, a much smaller one. See pp. 544-552.

distinct categories can be effected in every general concept if we ask ourselves what parts may be omitted in thought while maintaining the concept intact, and what parts, on the other hand, can not be removed without destroying the concept itself. The latter constitute the form of the concept, while the others pertain to its matter, like space or time (forms), in relation to the world of bodies (matter).¹

Now if we consider some social phenomenon, the formation of a State, the struggle of classes, a strike, alteration of values, etc., we can, in our mind, set aside all the circumstances which constitute the phenomenon as a concrete thing, while retaining the circumstance that it is a social event, and is quite distinct by reason thereof from a phenomenon of physical nature, such as a geological movement, a conflict of natural forces or the displacement of an object. But if we remove the idea that we are dealing with *regulated* relations among men, in general, we lose altogether the specific notion of a social phenomenon. Hence it follows that the methodical idea of *a thing to be regulated* constitutes the formal logical condition of the proper consideration of the co-operation of human efforts, which we call a social phenomenon.² Consequently, "the form of human society is nothing else than the idea of *external regulation*, as the logical condition under which alone it is possible to form the concept of the social co-operation of human efforts."³ In short, juristic regulation is essentially the form of social life, while its matter consists in the moral, political and economic arrangements, or, better still, in the whole collective effort directed to the satisfaction of every one's needs, to which Stammler applies the expression "Wirtschaft," so hard to translate

¹ "Wirtschaft und Recht," 2nd ed., 1906, pp. 112-113 (§ 22).

² "Wirtschaft und Recht," 2nd ed., 1906, § 20, pp. 101-107; cf. p. 248.

³ "Wirtschaft und Recht," 2nd ed., 1906, pp. 113-115, especially p. 115 (§ 22).

into French.¹ And if we confine ourselves to juristic life, properly speaking, its matter can be nothing else except the established law in its empirically conditioned elements, or, if you wish, in its historical results, while its form resides in the general thought which dominates this variable legal content according to an objective idea of justice.²

Accordingly, the problem of "just law" essentially aims at the discovery of a formal method of general value, capable of assuring the fundamental regularity ("die Gesetzmässigkeit") of social life, which will be able to hold in embrace the infinite varieties of its content and maintain their necessary unity.³ We are not therefore, in seeking for "just law," concerned in appreciating in themselves the multiple, contingent rules which depend upon the different changing circumstances of social evolution. Nor are we concerned with the opposition of "lex ferenda" to "lex lata," or the distinction between law historically formed and law created in an idealistic fashion. Our concern is to discover a formal criterion of these intrinsic elements, in the sense of unity ("Einheit") and universal validity ("Allgemeingültigkeit").⁴ Hence, the formula, natural law with variable content ("ein Naturrecht mit wechselndem Inhalte"). Connected with

¹ "Wirtschaft und Recht," 2nd ed., 1906, §§ 23-24, pp. 121-130, as compared with §§ 25-29, pp. 131-158. This somewhat elastic notion of "Wirtschaft" is criticized by some; thus by *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, p. 113 (§ 7).

² "Justice," II, 3, § 1, Matter and Form (of Law), pp. 167-169.

³ "Wesen des Rechtes," pp. xvi-xviii. "Theorie," Sechster Abschnitt, "Die Idee des Rechtes," pp. 437-558, passim, especially § 1, pp. 437-443; § 3, pp. 450-452; § 8, pp. 475-481; §§ 15-16, pp. 518-529; § 20, pp. 545-552. Cf. *R. Stammler*, "Die Gesetzmässigkeit in Rechtsordnung und Volkswirtschaft," Dresden, 1902. And on the *idea of Law* as distinguished from the *notion of law*, see *R. Stammler* ("Notion et portée de la 'volonté générale' chez Jean Jacques Rousseau"), in *Revue de métaphysique et de morale*, 1912, vol. XX, pp. 386-388 (§ III). Cf. above p. 507, note 5, end (no. 5).

⁴ "Wesen des Rechtes," p. xvii. "Justice," I, 1, § 1, pp. 17-21; II, 1, § 1, pp. 133-137. Cf. "Theorie," VI, 6, pp. 463-470; VI, 14, pp. 511-518; VI, 17-18, pp. 529-541.

the preceding discussion, it seems to express the principal idea of Stammler in a very striking manner.¹

8. This formula shows at the same time the attitude he maintains to the traditional doctrine of Law of Nature. Accepting, as a point of departure and by way of definition, the idea that "natural law is a law which corresponds to nature in its content,"² Stammler opposes it, for he does not admit the idea of a legal content, always identical with itself, universal and immutable. Quite the contrary, he affirms that there is not a single principle of law which can be firmly established a priori in its content, seeing that the latter is produced by empirical and historical contingencies.³ But, to embrace, determine and direct this infinitely variable content with that which constitutes it, say human needs and the means of satisfying them, we can and we must establish a formal method of general validity which will assign to it the mark of objective justice.⁴ And this is sufficient to realize the fundamental and eternally true idea of natural law,⁵ which implies a content in agreement with the nature of law rather than with the nature of man.⁶

While he thus supports — especially against the blind attack of Bergbohm⁷ — while considerably transforming

¹ "Wirtschaft und Recht," 2nd ed., 1906, p. 181. See the whole § 33, pp. 180-183.

² "Wirtschaft und Recht," 2nd ed., 1906, pp. 165-166 (§ 31). "Justice," I, 3, § 1, pp. 72-76. "Wesen des Rechtes," pp. iv-vi. "Theorie," p. 124 (II, 4).

³ "Wirtschaft und Recht," 2nd ed., 1906, § 32, pp. 172-180. "Justice," p. 90 (I, 3, § 5). "Wesen des Rechtes," p. vi. "Theorie," p. 125 (II, 4), pp. 714-715 (VIII, 14).

⁴ "Wirtschaft und Recht," 2nd ed., 1906, § 33, pp. 180-183. "Justice," pp. 89-90, 91-93 (I, 3, § 5). "Wesen des Rechtes," pp. vi-vii.

⁵ "Justice," I, 3, § 3, 80-85; cf. I, 1, § 2, pp. 21-25.

⁶ "Justice," p. 74 and p. 76 (I, 3, § 1). Cf. "Wesen des Rechtes," pp. iv-vi, and in *Revue de Métaphysique et de morale*, 1912, vol. XX, p. 384 ("Notion et portée de la 'volonté générale' chez J. J. Rousseau," § 1).

⁷ K. Bergbohm, "Jurisprudenz und Rechtsphilosophie," I Band, Einleitung, Abhandlung I, "Das Naturrecht der Gegenwart," Leipzig, 1892.

its concept, the traditional doctrine of natural law,¹ Stammler shows himself infinitely more rigorous in relation to the historical school of law,² and all the empirical systems which it seems to have called into being.

The historical school, which he sums up entirely in the romantic conception of a "Volksgeist," that creates in a mysterious and irresistible fashion — hence escaping all criticism — the common persuasion from which issues the positive law of a given people, seems to him altogether worthy of condemnation, because it sees only the problem of contingent becoming, and neglects that of absolute necessity, that which *ought to be*. Moreover, in imagining the "spirit of the people," it creates, contrary to the laws of sane logic, a living entity which has nothing indispensable in it and is entirely removed from experience. In reality this pretended "soul of the people" is nothing else but the sum of the "national peculiarities" of a given country, the existence and importance of which are not to be denied, but they must be assigned a secondary rôle, and in any case they can not form a part of the formal conditions, under which alone it is possible to embrace, in a generalized unity, the matter of juristic life as given in history, for these "peculiarities" are comprised in the matter itself.³

As for the empirical systems, which have been multiplied ad infinitum on the basis of the imaginative procedure of the Historical School, without, however, maintaining the unitary viewpoint secured to the latter by its

¹ "Wirtschaft und Recht," 2nd ed., 1906, pp. 168-171 (§ 32) and pp. 453-454 (§ 81).

² The starting point of Stammler's philosophico-juristic work, seems to have been a close criticism of the Historical School of Law, "Ueber die Methode der geschichtlichen Rechtstheorie," pp. 1-63 of "Festgabe zu Bernhard Windscheids fünfzigjährigem Doktorjubiläum," Halle, a. S. 1889.

³ "Wesen des Rechtes," pp. vii-xii. "Wirtschaft und Recht," 2nd ed., 1906, § 56, end, and § 57, pp. 306-312. "Justice," I, 5, § 2, pp. 114-117. "Theorie," pp. 388-392 (V, 9); cf. p. 146 (II, 8), p. 482 (VI, 9), p. 710 (VIII, 13), pp. 775-776 (IX, 6), p. 781 (IX, 6).

conception of the "Volksgeist,"¹ — systems founded upon the general sentiment of right, upon the opinion of men of wise judgment, upon the conceptions prevailing in a juristic community, upon the ethico-social rules of civilization, or upon the hierarchy of interests, not to speak of those who leave the matter to the free estimation of the judge, it is clear that Stammler can have nothing in common with them, because, apart from the weaknesses peculiar to each one of them, all of them have this defect in common that they ignore the important distinction of matter and form, and consider particularities instead of seeking a conditioning, formal method of general validity.²

He entertains, it seems, a more kindly feeling, nay an intimate sympathy, for a movement of ideas which, according to him, is clearly distinguished from the Historical School of Law,³ namely, the materialistic conception of history, the criticism of which has served as a basis for the most celebrated of his great works.⁴ It is because he sees in this system, in which he properly separates the principle from the Socialistic consequences which its promoters have deduced from it,⁵ the first, and up to that time the only, attempt to discover the fundamental unity and regularity that could assign a formal framework to the objective content of social life.⁶ Historic materialism, under the influence of a philosophy which considers the history of humanity as a mechanical process to be studied by a strictly natural method, claims to be able to arrive

¹ "Justice," pp. 116–117 (I, 5, § 2).

² "Wesen des Rechtes," p. iii and p. xl–xliii; add pp. xlviii–xlix. Cf. "Justice," I, 5, § 1, pp. 112–114; I, 5, § 3, pp. 117–119; I, 5, § 5, pp. 123–129. "Theorie," VIII, C, §§ 9–13, pp. 687–714.

³ "Wirtschaft und Recht," 2nd ed., 1906, note 8, p. 632.

⁴ "Wirtschaft und Recht nach der materialistischen Geschichtsauffassung," Leipzig, 1st ed., 1896; 2nd ed., 1906; 3d ed., 1914.

⁵ "Wirtschaft und Recht," 2nd ed., 1906, § 13, pp. 55–62. "Wesen des Rechtes," p. xiv.

⁶ "Wirtschaft und Recht," 2nd ed., 1906, p. 15 (§ 4), p. 18 (§ 5), p. 439 (§ 78).

at the result made clear above by laying down as a thesis the natural dependence of law (form of social life) in relation to the sub-economic phenomena of production and exchange (matter and movement of social life); so that a change occurring in the latter must, in the great majority of cases, produce, through the mediation of ideas, a corresponding change in the organization of the law.¹

If you come to apply it, however, this doctrine appears, from the point of view of a sane theory of knowledge, unfinished and inadequately thought out. Unfinished, because it has not determined critically the meaning of the fundamental concepts which it employs, such as society, economic phenomena, social mode of production, and so on, contenting itself usually with a vague reference to technic, when it is really a question of mastering nature in a practical way in the social coöperation of efforts. At the same time it is inadequately thought out, because it does not indicate clearly what kind of necessity it claims for the transformations of the law which take place, for the mere idea of their evolution is not sufficient to guarantee the justice of their content. The latter presupposes purpose, which this doctrine officially condemns, though its advocates do not hesitate to make use of it.² Thus the materialistic conception of history ends up with purely empirical conclusions,³ when, for example, it confuses conditioned matter with general form, and suggests as a criterion of law, class morality.⁴ But though it fails definitely in the aim which it has set itself, it remains true nevertheless that its principal effort is well directed toward a unitary and generally valid diagnosis, *as pure form*.

¹ "Wirtschaft und Recht," 2nd ed., 1906, §§ 5-8, pp. 17-34. "Wesen des Rechtes," pp. x-xiii.

² "Wesen des Rechtes," p. xiv. "Wirtschaft und Recht," 2nd ed., 1906, p. 19 (§ 5) and § 78, pp. 431-440. "Theorie," pp. 796-797 (IX, 9).

³ "Wirtschaft und Recht," 2nd ed., 1906, § 85, pp. 470-474.

⁴ "Justice," I, 5, § 4, pp. 119-123.

These positions, clearly maintained in relation to the principal systems proposed hitherto in the philosophy of law, accentuate the critical point of view of Stammler, and give the final touches of precision to the purely formal criterion, which is the keystone of his whole edifice.¹

Having given the general character of this formal criterion, which so far appears merely as a somewhat elastic and flexible envelope, Stammler must now transform it into a solid and firmly set armature, capable of embracing rigorously the phenomena of social life. This is the principal object of the theory of "just law" ("Die Lehre von dem richtigen Rechte").²

II

9. First of all, *what fundamental idea must be put at the basis of "just law,"* in order to summarize in a precise purpose this unitary and universally valid form, which must be imposed upon the historic and perpetually evolving matter, represented by the common effort of men associated for the purpose of satisfying their wants?³ It is not liberty, for its application leads only to a vicious circle, or to antinomies irreconcilable with the concept of law itself.⁴ Nor is it equality, which merely furnishes an analytic and fruitless development of the legal concept.⁵ Nor is it well-being and happiness (even if this were a general idea), where you find merely a subjective tendency, or else a pure tautology.⁶ In place of all these old formulae, Stammler offers us the "social ideal," which he takes

¹ Cf. also R. Stammler, "Die Gesetzmässigkeit in Rechtsordnung und Volkswirtschaft," Dresden, 1902, §§ 3-8, pp. 7-27.

² R. Stammler, "Die Lehre von dem richtigen Rechte," Berlin, 1902 (English translation in the present work); principally, Part Two, Method of Just Law, pp. 131-235. Cf. "Theorie," Sechster Abschnitt, "Die Idee des Rechtes," pp. 437-558.

³ Cf. "Justice," II, 1, §§ 1-2, pp. 133-145. "Wesen des Rechtes," pp. xviii-xxii, xliii-xlv.

⁴ "Justice," pp. 145-147 (II, 1, § 3).

⁵ "Justice," pp. 147-148 (II, 1, § 3).

⁶ "Justice," II, 1, § 4, pp. 148-155.

pleasure in developing with an overpowering enthusiasm.¹ This "social ideal," which is opposed not merely to the "social materialism" of Marx,² but also to the "politics of force" of R. von Ihering,³ and to the "pursuit of culture," proposed by other legal philosophers,⁴ is represented in Stammler by the essential concept of "the community of men with free volition,"⁵ i.e. of a society in which every one makes the objects of others his own, as soon as they permit of an objective justification.⁶

But the realization of such an ideal, which, as form, remains the supreme measure of "just law," requires principles which shall make possible the elaboration of the empirical and historically given matter, and, by supplanting the subjective criteria, shall serve as the first medium for the concrete application of the general formula to particular cases.⁷ These principles must not depend upon the results of an approximate judgment, nor must they be expressed in concrete precepts, but they require a systematic fulness which can assure their chief function of affording sureness of direction in judgment. As such they can be easily derived from the following observation, namely, that the formula of the "Social ideal," as referring to the union of individual purposes, contains two direc-

¹ Especially in the lecture, "Vom sozialen Ideal," which concludes "Wirtschaft und Recht," 2nd ed., 1906, § 102, pp. 577-601. Add, *ibid.* §§ 99-100, pp. 560-577 and §§ 103-105, pp. 602-630.

² "Wirtschaft und Recht," 2nd ed., 1906, pp. 61-62 (§ 13).

³ "Wesen des Rechtes," p. xxxviii. Cf. "Wirtschaft und Recht," p. 480, end (§ 86). "Justice," p. 22, end (I, 1, § 2).

⁴ "Theorie," pp. 515-516 (VI, 14).

⁵ To be understood as meaning, free from all desire which can be justified subjectively only. "Wirtschaft und Recht," 2nd ed., 1906, p. 600. Cf. R. Stammler, "Notion et portée de la 'volonté générale' chez Jean Jacques Rousseau," in *Revue de métaphysique et de morale*, 1912, vol. XX, p. 389 (§ IV). Add, pp. 385-386 (§ II).

⁶ "Wirtschaft und Recht," 2nd ed., 1906, p. 581 and p. 600 (§ 102). "Justice," II, 1, § 5, pp. 152-155. "Wesen des Rechtes," pp. xxxviii-xl. "Das Recht der Schuldverhältnisse in seinen allgemeinen Lehren," Berlin, 1897, §§ 10-12, especially p. 41, 43, 45, 47. "Theorie," VI, 7, pp. 470-475.

⁷ "Justice," II, 2, § 1, pp. 156-158. "Wesen des Rechtes," pp. xlviii-xl.

tions of thought, the one, in favor of maintaining the proper interests of every associate, who, on this score, asks *consideration for* himself and owes similar *consideration* to others; the other, in the sense of the coherence and community of purpose of all, in view of a solidarity of interests, which gives predominance to the *coöperation* of all in the purposes of the whole. Hence we have two distinct poles of attraction, on the one hand the *consideration* of the individual in his juristic volition (every one must bear his own burden): on the other hand, the *cooperation* of all in the common object of human efforts (every one must carry the burden of the other). And since the adaptation of this double direction to concrete juristic questions is effected by means of legal relations, from which result the rights and duties of every one in the individual as well as the social sphere, we can see, from the point of view of a formal generality, that this question of adaptation will apply to the creation or maintenance, or more simply the *existence*, as well as to the *development*, of juristic relations.¹

Thus are erected two series of *principles of "just law,"* each one of which comprehends two terms.

I. On the one hand we have the principles of *consideration* (die Grundsätze des Achtens) which, aiming to protect the proper will of the one juristically bound, in its freedom and power of self-determination, are expressed in these terms: "1. *The content of a volition must not be left to the arbitrary control of another.* 2. *A juristic claim must not subsist except on the condition that the one bound may still remain his own neighbor.*"² These two formulae have as their common result to prevent a juristic precept from completely sacrificing an associate to the purely

¹ "Justice," II, 2, § 2, pp. 158-161. "Wesen des Rechtes," p. 1, end, and pp. li-lii.

² That is to say that each one must remain *an end to himself*, to make a *just will* possible. See on this point, "Justice," pp. 217-218 (II, 5, § 3). Cf. below, p. 523, note 2 (no. 9).

subjective purposes of another in such a way that he should be obliged to accomplish, and regard as his supreme law, the personally limited purposes of the other party. Now this formal direction of thought is found in the matter of the *existence* of an obligation (for example, limitation of freedom of contract by good morals), as well as in the *development* of the legal relations which follow from it (for example, the principle that the debtor must perform his obligation in all sincerity and good faith ["nach Treu und Glauben"]).¹

II. On the other hand we have the principles of *co-operation* ("die Grundsätze des Teilnehmens"), which give expression to the idea, included in the "social ideal," that the juristic precept uniting the individuals with a view to a common struggle for existence, can not, without contradicting itself, impose duties exclusively on the one who is subjected by it to the social coöperation of efforts. This principle, applied to the existence and the development of legal relations, is rendered in the following formulae. "1. *He who is juristically united with others can not be arbitrarily excluded from the community.* 2. *A power of disposition juristically granted can not be exclusive except in the sense that the one excluded may still remain his own neighbor.*"² Hence follow numerous consequences, starting with the cases of extreme distress, in which the individual would have to struggle alone for his existence, and going as far as the minutest details of juristic commerce, which appear in the questions relating to the validity of contracts in restraint of trade and boycott.³

We must guard ourselves, however, against the notion that the principles of "just law," are like legal texts of a general character, which express comprehensive juristic

¹ "Justice," II, 2, § 3, pp. 161-163. "Wesen des Rechtes," p. li.

² Always in the sense of *an end to himself*, to make possible a *just volition*. See "Justice," pp. 217-218 (II, 5, § 3). Cf. above, p. 522, note 2 (no. 9).

³ "Justice," II, 2, § 4, pp. 163-165. "Wesen des Rechtes," p. li.

precepts, or reveal the foundations of social organization. They are merely methodical lines of direction, adapting themselves to a material that is given in the course of history, and which changes continually in the bosom of the social movement, in order to subject it to the formal property of justice. They come in therefore only for the purpose of limiting the external regulation of the will, which is the function of all juristic disposition, and of putting upon it in categorical fashion, according to an exhaustive and exclusive distinction, the stamp of justice or the stigma of injustice.¹

10. However, these principles of "just law," directly deduced from the "social ideal," are in themselves too abstract, too far away from life, to be easily and profitably adapted to the infinite varieties of concrete cases. Between the latter and the principles Stammler introduces, as a new intermediary link of a methodical character, *the typical model of "just law,"* which, having general validity and at the same time a greater flexibility of application, makes easy and certain the passage from theory to practice, and thus allows finally a judgment in particular cases.²

When Stammler speaks of a typical model of "just law," he wishes us to represent to ourselves in thought, as between the parties whose rights are under discussion, a separate society ("Sondergemeinschaft"), into which each one brings his volitions and claims, with their reciprocal relations to each other, among which the principles of "just law" alone can make possible an objective choice.³ In this particular society the notion of "neighbor" plays an important rôle, as it does in the principles of "just

¹ "Justice," II, 2, § 5, pp. 165-166; cf. pp. 163-164 (II, 2, § 4). "Wesen des Rechtes," pp. li-iii; cf. p. xlviii. "Theorie," VIII, 7, pp. 676-682.

² "Justice," II, 5, § 1, pp. 211-215.

³ "Justice," II, 5, § 2, pp. 215-217. Cf. "Wesen des Rechtes," p. liii. Cf. "Theorie," VI, C, §§ 9-13, pp. 481-511.

law." It is represented by a series of concentric circles, drawn around the individual, and marking the relative degrees of the spheres of interest in which he moves.¹ And, as every rule of law tends to impose upon the subject a certain attitude (to do or forbear), which may be generically denominated act ("Leistung"), we must, in applying it, separate the acts furnished by each one, whether they be with his own person, or in relation to his property, or the persons who are juristically entrusted to him (family), observing that acts in relation to property raise the serious question of the objective value of things.² In the sphere of legislation (this is the meaning of Stammler's "politics"), the application of all these ideas will lead us to recognize certain general postulates, the postulate of the security of law, postulate of personality, postulate of general solicitude, postulate of measure. In the sphere of the administration of civil and criminal justice our task will be to obtain from those ideas a guide, at once formal and real, which shall enable us to subject the facts to decisive juristic criteria.³

Finally, it is no less important to consider the variety of *means by which "just law" is realized*.⁴ The social power may intervene authoritatively to direct all the common efforts, or it may leave to the individual parties the free regulation of their juristic relations ("Einheitswirtschaft und freie Beiträge").⁵ The legislator may lay down the principles himself, abstract and casuistic, rigid and flexible, for the purpose of resolving disputes justly, or he may leave to the judges, or even to the parties them-

¹ "Justice," II, 5, § 3. Who is my neighbor (fellowman)? pp. 217-223. The reader will note especially (p. 218) the fine allusion which Stammler makes here to the parable of the "good Samaritan" in the Gospels. Cf. "Theorie," p. 136 (II, 6).

² "Justice," II, 5, § 4, pp. 223-228.

³ "Justice," II, 5, § 5, pp. 228-235. Cf. "Wesen des Rechtes," p. liv.

⁴ "Justice," II, 4. The Means of Just Law, pp. 188-210.

⁵ "Justice," II, 4, § 1, pp. 188-193. "Theorie," p. 592 (VII, 8).

selves, the care of seeking and finding the just decision in each particular case ("Gerechtigkeit und Gelindigkeit").¹ Sometimes, also, one may without inconvenience, subordinate the law to all its *real* exigencies; sometimes, on the other hand, it will seem more opportune, in order better to attain the end in view, to simplify the real conditions by means of an *artificial form*, as in the institution of books of registry, in prescription and in procedure as a whole ("wirkliches und förmliches Recht").² Sometimes one even consciously maintains unjust law, by reason of necessities of fact which prevent the effective application of "just law," and in order not to weaken the inviolable character of juristic constraint, which would result in troubling the very source of the law itself ("bewusst unrichtiges Recht");³ not to speak of the silence of the legislator, which often remains the supreme means, indispensable and no less efficacious, of assuring the realization of "just law." For though lacunae are possible in the *formulae* of the latter, there can not be any in its essence, or in the mission incumbent upon it of establishing in each particular case what the "social ideal" demands, according to the fundamental idea which dominates every juristic organization and makes of it an attempt to compel the realization of objective justice.⁴

11. It remains to show that this doctrine of "just law" is not merely a theoretical scheme, but that it can be adapted without insurmountable obstacles to actual practice so as to develop in it solid and fruitful results. This Stammler has endeavored to do in the third book of his masterly work, "Die Lehre von dem richtigen Rechte."

¹ "Justice," II, 4, § 2, pp. 193-200. Cf. "Wesen des Rechtes," pp. lii-liii, lv-lvi, lvii.

² "Justice," II, 4, § 3, pp. 200-206.

³ "Justice," II, 4, § 4, pp. 206-207. Cf. "Wesen des Rechtes," p. lviii.

⁴ "Justice," II, 4, § 5, Lacunae in the Law, pp. 207-210. See also "Theorie," VII. 16-17, pp. 641-652. And cf. what was said above, pp. 509-513 (no. 6).

Here under the title, "The Practice of Just Law" ("Praxis des richtigen Rechtes"), he presents to us the application of the preceding theory to the most important spheres of juristic life, which he divides as follows, according to a synthetic, altogether personal view of the whole of private law: Just development of the established relations of law; Limits of the autonomy of the will or of the freedom of contract; Duties imposed by just law; Determination of a just content of a juristic act; Justifiable end of legal relations.¹

We can not summarize here this part of Stammler's work, absolutely important as it is in giving us a very clear impression of the working of his method, ingeniously handled as it is and supported on Roman texts as well as on those of the recent legislation of the Empire.²

But in order to complete the presentation of this method in its fertile fulness, and under its most favorable aspect — at least with a view to facilitating access to it for the French juristic public, I should only like to pick out one series of applications out of the imposing whole, one that is particularly interesting in my mind, and, without pretending to expound it in its whole amplitude, simply to indicate step by step the sequence of its developments, drawing special attention to those cases which exemplify best the effective functioning of the doctrine.

I shall choose for this purpose the problem of the "*limits of the freedom of contract*," to which Stammler has devoted the second chapter of the third book of his Theory of Just Law. In the beginning of this chapter he speaks of this as a theme hitherto scarcely worked out with any degree of thoroughness, meaning by that that it has not received any solutions firmly based upon principles and deduced by means of a strong demonstrative procedure. The result is that the unitary idea under which cases

¹ "Justice," Part Three, "Practice of Just Law," pp. 237-467.

² See especially, "Justice," Part Three, Foreword, pp. 239-242.

should be ranged remains nebulous, that the reply to the questions raised in this matter in practice seems to come from purely personal impressions, and that the different solutions do not go back to any coherent whole. The Professor from Halle claims that the theory of "just law" will fill up these lacunae and remove the defects.¹ He makes an effort to prove it by proceeding as follows.

12. First of all are presented certain general considerations, touching the institution which is to be more thoroughly examined in its practical extent.

The freedom of contracts or rather of juristic acts (often called by us autonomy of the will), which Stammler comprehends in the term "free coöperation" ("freie Beiträge) as opposed to "unitary regulation" ("Einheitswirtschaft"), appears a priori as one of the means of "just law."² And thus it presents the character of a universal institution, although in the majority of cases sanctioned, implicitly or partially, by the positive laws.³ No less universal seems the necessity of fixing limits to this freedom, with a view to assure the reign of "just law" in the midst of conflicting interests.⁴

If one wishes to penetrate the fundamental character of these limits, one is led to distinguish two kinds, which correspond in turn to two new means of "just law," namely, "strict law" ("gerechtes Recht" or "Gerechtigkeit"), fixed in technical form by the social power, and "flexible" or "lenient law" ("gelindes Recht" or "Geligkeit"), which leaves the precise interpretation of it to the judgment of those who apply it.⁵ In fact it is true that besides the narrow and strictly legal limits to the autonomy

¹ "Justice," p. 300 (III, 2, § 1).

² See above, p. 525, text and note 5 (no. 10).

³ "Justice," pp. 301-302 (III, 2, § 1); cf. II, 4, § 1, pp. 188-193.

⁴ "Justice," p. 302 (III, 2, § 1).

⁵ "Justice," pp. 302-303 (III, 2, § 1); cf. II, 4, § 2, pp. 193-200, and above, p. 526, text and note 1 (no. 10).

of the will, there are others which the general notion of "just law" alone allows to fix. And this distinction is made clear, for example, if we compare §§ 134 and 138 of the German Civil Code of 1896. The first condemns those juristic acts which violate a legal prohibition ("das gegen *ein gesetzliches Verbot* verstösst"), so that, in order to determine those acts, all that is necessary is a simple technical adaptation. The second declares null and void those which offend against good morals ("das gegen *die guten Sitten* verstösst"), the latter being nothing else than the principles of "just law."¹ It is necessary to state moreover that the second category as well as the first raises, from our point of view, a question not of morals but of law, properly speaking, since it is simply a question of judging an external attitude without going into the intimate feelings or sentiments.²

Finally, and according to the preceding observations, the chief problem that, with a view to the application of the theory of "just law," is raised by this question of the limits of the freedom of contract, may be expressed as follows: "How can we establish, for those juristic acts which offend against *good morals*, a methodical adaptation of the typical model of 'just law,' according to its principles?"³ But in order to determine still more clearly this sphere of investigation it seems necessary to cast a glance upon those juristic acts which violate a legal prohibition. And even before that we must draw attention to some points enabling us better to fix the extent of the problem.⁴

Placing himself at this last point of view, Stammler endeavors at first to make clear what is meant by the

¹ "Justice," pp. 302-303 (III, 2, § 1); cf. pp. 36-38 (I, 1, § 5).

² "Justice," pp. 302-305 (III, 2, § 1); cf. pp. 40-41 (I, 2, § 1), p. 44 (I, 2, § 2), pp. 48-49 (I, 2, § 2), p. 54 (I, 2, § 3), pp. 58-59 et pp. 62-63 (I, 2, § 4).

³ "Justice," p. 305 (III, 2, § 1).

⁴ "Justice," p. 305 (III, 2, § 1).

content of the juristic act that is under discussion?¹ This content has nothing to do with the origin of the act, which is judged as being dependent upon the duties of "just law."² It comprehends essentially, along with the object proper of the juristic volition, the conditions which are intimately connected with it.³ It is a more delicate thing to separate the motives or incentives of the will, which, indifferent in themselves (for example, loans or securities to facilitate gambling; sale of arms to one who, in the knowledge of the vendor, is planning a murder; contracts relating to houses of ill fame), will nevertheless bring about, according to the principles of just law, the nullity of the act, when, on analysis, they turn out to be a conniving to defraud a third party (for example, paying a vendor, who knows it, with stolen money; acceptance of a gift of a thing obtained wrongfully), or when they show the intention to paralyse the execution of engagements regularly entered into (for example, the purchase of a movable object which one knows is already sold, but not delivered).⁴ On the other hand we must distinguish those cases in which the contract as a whole is subject to juristic condemnation from those in which the latter attaches to certain clauses only, leaving the rest of the contract, in principle, undisturbed, under reservation of some particular difficulties.⁵ Finally it is important to observe that these rules, which condemn as illegal certain juristic acts, can be extended to include simple acts productive of rights, which (viz., the acts) offend against the same prohibitions, as in the case of the photograph, irregularly obtained, of the mortal remains of Prince Bismarck.⁶

¹ "Justice," pp. 305-309 (III, 2, § 1).

² "Justice," p. 306 (III, 2, § 1); cf. III, 3, pp. 348-386.

³ "Justice," pp. 305-306 (III, 2, § 1).

⁴ "Justice," pp. 306-309 (III, 2, § 1).

⁵ "Justice," pp. 309-310 (III, 2, § 1).

⁶ "Justice," p. 310 (III, 2, § 1), also p. 112 (I, 5, § 1), cf. *R. Stammler*, "Praktikum des bürgerlichen Rechts," 2 A., Leipzig, 1903, pp. 230-232 (4, xxxiii).

Having made these observations, Stammler passes in review the principal legal prohibitions which menace juristic acts. We are dealing here with dispositions of the legislator dictated by his conception of average justice, which the judge must apply as categorically just. The application of these dispositions is therefore purely an affair of technic. And the task of the legal philosopher, who works with a view to practice, reduces itself to dividing them in groups, expressing their fundamental idea, and explaining it by means of examples.¹

This is what Stammler aims to do in distinguishing three classes of legal prohibitions, among which the most important applications of the principle are divided, prohibitions derived from the Roman laws or the modern German laws, or even those simply suggested by the practice of contemporary law. 1. Direct prohibitions of certain juristic acts by the civil law, such as the prohibition of usurious operations, according to § 138, 2 of the German Civil Code, the prohibition of contracts to do an impossible act, or contracts relating to "res extra commercium," and the numerous particular prohibitions of the "Bürgerliches Gesetzbuch" of 1896 (for example, §§ 248, 310, 312, 1229, 1714, 2302, 925, 1019, 1433, 2065, 1297); not to speak of the nullification of acts done "in fraudem legis", which may be regarded as implicitly formulated by those provisions in fraud of which the acts were committed.² 2. Prohibitions resulting from criminal laws, which refer to juristic acts by which one provokes or furthers a crime, or to coöperations with a view to a punishable act. From these must be carefully separated those acts which are permitted, though one of the parties in carrying them out makes himself liable to a penalty (for example, a sale in disregard of Sunday rest imposed by the law; alienation of objects seized in execution, etc.).³ 3. Provisions of

¹ "Justice," p. 310 f. (III, 2, § 2).

² "Justice," pp. 310-313 (III, 2, § 2).

³ "Justice," pp. 313-314 (III, 2, § 2).

the law by which the legislator desires to prevent certain juristic acts by giving a particular importance to particular laws. This brings in the obsolete notion of public order, and, in particular, condemns contracts to obtain a divorce by means of an allegation and acknowledgment of false facts; betrothal to a third party by a person who is married; contracts aiming to impose certain breweries upon an innkeeper in an indefinite and irrevocable manner; agreements having as their object the imposition of silence touching acts which are condemned by the public, or giving payment for a social duty.¹

All these developments concerning the legal prohibitions which can affect juristic acts have as a result to restrict those prohibitions which come solely from the notion of good morals, by separating from them those cases in which a text defines or limits the judgment that is to be rendered. This not only assures a complete technical effect to the legal formulae, but in addition to that, even independently of certain particular dispositions of the German Civil Code (§§ 309 and 134), involves differences between the two kinds of prohibitions, as to the territory of the legislative sphere in which the prohibitions are to be in force (local laws), in international private law, and as to the time when the prohibition goes into effect.² In a general way it is clear that the prohibitions which result from "just law," here called good morals, have a larger scope of application than those which owe their validity to the legal text. Accordingly the latter are of greater interest to legal technic than to the theory of just law, properly speaking.³

13. Accordingly Stammler insists more upon the juristic acts which are contrary to good morals, and the prohibition of which, foreign to pure morality, has its basis

¹ "Justice," pp. 314-318 (III, 2, § 2).

² "Justice," p. 318-322 (III, 2, § 3).

³ "Justice," p. 322 (III, 2, § 3).

only in the rules of "just law."¹ After speaking of the insufficient attempt at a systematic classification of these acts proposed by Gruchot,² he makes an attempt in his turn to schematise them according to the principles of "just law" which he has formulated above, following the method of applying these principles to concrete cases, which he has likewise established, especially on the basis of the typical model of a particular society supposed to exist between the parties interested in the validity of the act.³

He begins by regulating in a few words those particular cases, mentioned above, in which an isolated disposition (but not the whole) of the juristic act contravenes the essential principles of "just law," cases the most notable of which is dealt with in § 139 of the German Civil Code.⁴ He then takes up the more general conditions which annul a juristic act entirely as being contrary to good morals. He states in the very beginning that in these hypothetical cases where we are dealing with the very existence of the act (not simply with its fulfilment), the principles of *consideration* and of *coöperation* come in under their first form⁵ to certify that neither in the obligations which are imposed upon him, nor by his exclusion from social life, can a party be left to the arbitrary control of another. And we do not have to consider, according to the technic of established law, whether this result is worked out under the form of real right or under the form of obligatory right.⁶

And now if we observe that a result of this nature, due either to an exploitation of one of the contracting parties by the other, or to the combination of these two against a third, takes the form of acts imposed either on the

¹ "Justice," pp. 322-323 (III, 2, § 3).

² "Justice," pp. 323-324 (III, 2, § 3).

³ "Justice," p. 324 (III, 2, § 3). Cf. above pp. 520-526 (nos. 9 10).

⁴ "Justice," pp. 325-327 (III, 2, § 3).

⁵ See above, pp. 522-523 (no. 9).

⁶ "Justice," pp. 324-325 (III, 2, § 3).

person himself or on those who are near him, or sometimes burdening his property merely, and that these acts may be of commission or omission, we obtain by the combination of these modes an outline of hypothetical cases, which merely requires filling out.¹

To do this, Stammler considers in succession those illegal juristic acts which aim at doing, and those which impose an abstaining from doing.²

I. A. In the first rank of juristic acts aiming at the doing of a thing which are condemned as illegal by "just law," are those which have as their object to subject the proper person of one of the parties to the arbitrary control and demands of the other. Such acts are in violation of the requirement of personal consideration, and if they emanate apparently from the will of the obligor himself, they show that he has abdicated his will in favor of the other, and has put himself completely under his disposition. This resignation is in evident contradiction with the idea of a particular society in which each one must regard the other as a proper end in himself. The law can not tolerate such a contradiction.³ Thus we find prohibited, as contrary to good morals, slavery in all its forms, gambling away one's own person, the agreement obtained by Shylock in the Merchant of Venice, a promise to allow oneself to be beaten in consideration of a promise received from the other party, contracts encouraging alcoholism, a "contractus cum meretrice" and all other sexual engagements outside of marriage, and agreements restricting religious freedom.⁴ Distinctions must be made in other cases, as follows: A contract for nursing is valid in principle, unless it results in sacrificing the nurse's own child in favor of the child she undertakes to nurse. Contracts for services

¹ "Justice," p. 327 (III, 2, § 3, end).

² "Justice," III, 2, §§ 4-5. Illegal Juristic Acts of Commission, pp. 327-337; of Omission, pp. 338-347.

³ "Justice," pp. 327-328 (III, 2, § 4).

⁴ "Justice," pp. 328-330 and pp. 330-332 (III, 2, § 4).

which endanger the life of the promisor (contracts with sailors, mountain guides, toreadors or toreros), are valid or not according to the end aimed at. Dispositions one makes of his dead body are in principle null and void, unless they are justified by the supreme interest of progress.¹

B. Just as one can not thus resign to a third party his own person, so one can not validly bind himself to an act involving persons juristically entrusted to the promisor. Thus agreements in derogation of legal principles concerning the religious education of children must be condemned, just as the classical Roman law condemned the betrothal of two minors decided by their parents alone. As regards contracts concluded between parents in relation to the education of children, they are opposed to the principles of "just law" only if they exceed the measures simply prescribed in the interest of the child to be educated, and are dictated by the personal convenience of the holder of the parental or tutorial power. Similarly in contracts in which parents give up their children to third parties, the transaction is void whenever the person of the child is given over to the arbitrary will of the other party.²

C. We shall now pass to those positive engagements by which a person allows himself to be exploited in connection with his property. We find here three distinct categories which, except for some qualifications we shall make, come under the reprobation of "just law." (a) In the first place is usurious exploitation other than that which comes under the terms of § 138, 2 of the German Civil Code, and which is prohibited in a positive legal manner (according to BGB. § 134). Here belong those cases where the promisor is placed at the disposition of the other party, like a passive instrument, as is the case, for example, in certain gifts by way of remuneration, in loans made by brewers to poor dealers put-

¹ "Justice," pp. 330-331 (III, 2, § 4).

² "Justice," pp. 332-333 (III, 2, § 4).

ting the latter at the mercy of the former, and in certain other injurious agreements. It is necessary, however, in order to merit prohibition, that there be exploitation of the debtor, which implies that the creditor knows the situation.¹ (b) Giving up certain proprietary elements to the complete discretion of a third party, as may be the case, for example, by reason of the indefinite character of the obligation, in the stipulations of a contract for work which leave the imposition of fines to the discretion of the employer, or in certain clauses of theatrical engagements which permit the director to retain arbitrarily, in cases provided in advance, the salaries of the artists. In all these cases one must see if there really is speculation at the expense of another.² (c) Finally, juristic acts aiming to give compensation for the fulfilment of a duty, whether the duty be one imposed by a legal text or even (though there is a possible doubt here) one resulting merely from "just law." The reason is that in both cases the idea of juristic obligation is in contradiction with the agreement, which has for its object the fulfilment of this obligation, an agreement which supposes that the latter is dependent upon the arbitrary will of the obligor.*³

II. In principle it is permitted to renounce a power which belongs to us by nature or law. But if this renunciation depends upon the arbitrary will of the obligee, we are in the presence of juristic acts involving an abstention, which in the majority of cases are opposed to the principles of "just law." And here the following important peculiarity may happen, namely, that several persons unite for the purpose of bringing the obligor to this condition of dependency. Be that as it may, the possibilities attaching to this order of ideas are subject to the same

¹ "Justice," pp. 334-335 (III, 2, § 4).

² "Justice," pp. 335-336 (III, 2, § 4).

[* "Créancier" is here no doubt a mistake for "debiteur." Tr.]

³ "Justice," pp. 336-337 (III, 2, § 4).

classification as the cases of illegal juristic acts of commission.¹

A. We shall have then first, juristic acts by which a party restricts his own personality. Examples are: the renunciation by a person of his capacity to exercise rights, by the establishment of a voluntary wardship; contracts arbitrarily suppressing or limiting the freedom of association; a clause in a lease, preventing the lessee, under penalty of immediate notice, to call an approved physician, even in cases of need; agreements, restricting the freedom of choice of domicil (entered into, for example, by a married man with the parents of his wife); renunciation of the right to apply to the courts, without the substitute of a court of arbitration; limitations on the right of marriage, as is practised by certain families of the high nobility; renunciation of the legal power of retractation, especially of the power of refusal to marry after betrothal by reason of the bride's pregnancy by a third person.² Stammler, however, does not consider it an arbitrary limitation of personality to pledge oneself, under a penal clause, to a temperance society, and he regards such engagements as valid on the ground that they are in the interest of a regular social life, at least if the penal clause forbids only immoderate use of alcohol.³

B. We must call attention next, at least as a theoretic possibility, among the prohibitions imposed outside of legal texts, to those juristic acts which aim at the omission of care due to persons entrusted to us, or the neglect of relatives concerning whom the law provides in an incomplete fashion only.⁴

¹ "Justice," p. 338 (III, 2, § 5, begin).

² "In so far as it is intended to establish in this way an obligation to marry, there is a violation of the first principle of *consideration*; in so far as there is exclusion of the right of withdrawal, there is an attack on the principle of *coöperation*." "Justice," pp. 339-340 (III, 2, § 5). Cf. above pp. 521-524 (no. 9). And for all the discussions in the text, see "Justice," pp. 338-340 (III, 2, § 5, 1).

³ "Justice," p. 339 (III, 2, § 5).

⁴ "Justice," p. 340 (III, 2, § 5).

C. But the most important category of engagements not to do certain things, which come under the reprobation of "just law," refers to those cases in which the abstention from a given proprietary activity, is made to depend, by reason of juristic acts, upon the discretion of a person other than the one interested, whether it be that a party agrees to be excluded from social *coöperation* at the free whim of another, or whether the contracting parties come to an understanding in order to exclude a third party according to their own will. It is clear that in these conditions, the principles and the model of "just law" will, in the majority of instances, find spontaneous application.¹ Stammerl confines himself therefore to a review of the principal possibilities suggested by legal practice, calling attention merely to the motives for hesitation or doubt which some of them raise.² Thus he condemns agreements to change the freedom of bidding at auction (*pacta de non licitando*; cf. French Criminal Code of 1810, 412, 2), whenever they are abused, either in the reciprocal relations of the contracting parties, or in regard to the auctioneer.³ He is led to some more distinctions which he presents to us in a series of examples in which he judges, from the same point of view, clauses in restraint of trade, aiming to limit the power a person has to exercise a given trade, profession or branch of social activity. These are incompletely characterized in § 74 of the new German Commercial Code, and ought not to be annulled, it seems, except when they greatly paralyze, in an arbitrary fashion, and without a plausible economic or social motive, the free activity of any person.⁴ On the other hand he judges very strictly agreements to cut the economic relations of a rival with hostile and malicious intent, and he condemns without reserve, as clearly opposed to the principles of "just law,"

¹ "Justice," pp. 340-341 (III, 2, § 5).

² "Justice," p. 341 (III, 2, § 5).

³ "Justice," pp. 341-342 (III, 2, § 5).

⁴ "Justice," pp. 342-343 (III, 2, § 5).

the practise of the boycott.¹ Finally, and still from the same angle, he directs his attention to cartels, rings, syndicates, trusts and all other groups, aimed, each in its sphere, to react against the anarchy of production and exchange. After calling attention on the one hand to their economic advantages which make them resemble certain methods of "just law," and on the other to the dangers which come from their essentially subjective source, and which can make of them instruments of oppression of the associates themselves or of the consumers; and after observing that the Roman texts relating to analogous practices throw no light upon our present law, he decides that the particular cases of these groups can be judged only according to the concrete circumstances and the principles of *coöperation*. On the one hand, we can not admit that an individual member of a group should be deprived of his proper participation in economic life, and should depend upon the arbitrary will of others. On the other hand nullity should attach also to those industrial agreements which are directed by their authors against third parties (consumers or others), so as to put the latter at the discretion of the former, instead of aiming at a just regulation of the common efforts. In fine, it is important to remember here that the individual has not merely received everything from society in the past, but is still continually taking from it. If we recognize this we can not conceive that he can appeal to society in favor of an attitude that is directly opposed to social ends.²

14. Such appears to me, in its grand outlines, to be a sketch and summary, exactly following the developments of the problem concerning the limits of the autonomy of the will, so conscientiously treated by Stammler.³

¹ "Justice," p. 344 (III, 2, § 5).

² "Justice," pp. 345-347 (III, 2, § 5).

³ The reader may compare the profound study on §138 of the German Civil Code, by *R. Saleilles*, "De la déclaration de volonté," Paris, 1901, pp. 251-302.

In reality it would be necessary to take up, one by one, all the applications of the practice of "just law" which this eminent jurist successively passes in review,¹ in order to get a better appreciation of the positive and pragmatic meaning of his doctrine. And if one wishes to penetrate to the bottom of Stammler's thought in order to discover the whole wealth of ideas contained therein, he must not withhold himself from this task, which will reward him amply besides by the novelty of aperçus which it will reveal to him. But so far as I am concerned, and to remain faithful to a higher and more general end, I must limit my exposition on this point. I must rather excuse myself for having presented in scanty and dry outline what is merely a simple "exemplification" of the theory of "just law," and thus run the risk of giving an inexact and unfaithful idea of the broad and profound style of the learned thinker of Halle. I had to make the attempt, however, to complete my presentation of his whole work.

And now if I wished to sum up again, with a view to the proper object of my present study (scientific elaboration of positive law), and in a last brief view, this entire work, centering about the theory of "just law," especially as it is expressed in vigorously turned formulae, aiming to dispose of social realities in a supremely logical system, I could, probably, express the principal conclusions in the following ideas.

Social life, considered as the common effort of men to satisfy their needs, finds its *matter* empirically given in the variable realities of history. Law, on the other hand, which is an external regulation constraining the conduct of men, must assign to social life a *form* superior to the contingencies of time and place. This form, which aims to establish a unitary regularity of general validity, is rendered with sufficient exactness as "*natural law with variable content*." The realization of this form is expressed in the

¹ "Justice," Part Three, Practice of Just Law, pp. 237-467.

"social ideal," which represents to us a "*community of men willing freely*," or, better still, a society in which every one makes his own those purposes of others which are objectively justified. The "social ideal" itself, in order to be adapted to practical life, expresses itself in two principles, deduced from the ideas of *consideration* and *coöperation*, the latter dominating, in a double aspect, the existence as well as the development of juristic relations. To make use of these principles of "just law," we have to represent to ourselves a typical model of the latter, constituted by a society, supposed to exist between those divided by a juristic conflict, in which each one, while subordinating himself to others, must remain for himself a fellow-man, and not give up anything of essential consideration or coöperation. In this way, reviewing the variety of relations which the law establishes between men, we can easily judge the acts thus imposed upon them, either on their own persons, or in relation to the persons closely related to them, or in connection with their property. And one must not forget the variety of means of "just law," all converging toward the sole essential object to be attained.¹

Ultimately, if I may be permitted to add a personal word to the full and systematically ordered formulae of Stammler, this essential object seems to identify itself completely with the supreme concept of a society existing among beings endowed with equal value, who must be at once independent and assured of the social bond in order to pursue their individual ends.

III

15. I have tried to expound in its entirety, and by means of as comprehensive a summary as possible, the legal philosophy of Stammler, considering its robust

¹ Cf. "Theorie," IX, 16. "Das Suchen nach dem vollkommenen Abschlusse," pp. 829-835.

frame which does not permit it to be regarded as negligible. At the very least we can not deny him the merit of having proposed, for the ever troublesome question of natural law, or, better, of the scientific and moral bases of positive law,¹ solutions, the fulness of which, and the logical coherence and the flexibility of practical adaptation, give evidence of a profoundly thought out system, before which criticism should stand still and reflect, whether it be to distinguish the durable parts of the system, or to discover the weak points or the subjects that need retouching.²

This is the kind of criticism which, without losing sight of my proper object, I must sketch at the end of this exposition as the conclusion thereof. I shall, however, keep to the grand lines of the theory, without insisting on the details. For a minute appreciation of the latter would make me run the risk of forgetting the fundamental trend of the work. And I shall examine the latter in itself, from the point of view of the fundamental results which it claims to establish, rather than from that of a rigorously logical method,³ in which it is easy enough to find faults, which a sure intuition can largely make up for.⁴

In trying to establish, in his "*richtiges Recht*," a typical law which lays no claim to universality or immutability of content, which escapes the subjectivity of juristic sentiment, and which, nevertheless, conserves the aspect

¹ Cf. above nos. 68-71, pp. 1-20 [not here translated].

² One may consult the following criticisms (one-sided, in my opinion) of Stammler's philosophical work. (a) For the economic point of view, *Max Weber*, "R. Stammler's 'Ueberwindung' der materialistischen Geschichtsauffassung," in *Archiv für Sozialwissenschaft*, 1907, vol. XXIV, N. F. VI, pp. 94-151; (b) For the juristic point of view, *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," Berlin und Leipzig, 1909.

³ In this way I aim to separate myself clearly from the point of view, somewhat pedantic in my opinion, that has inspired the criticisms of *Max Weber* and *H. U. Kantorowicz*, mentioned in the preceding note.

⁴ Cf. *Fr. Geny*, "Science et Technique en droit privé positif," I, Paris, 1914, nos. 25-28, pp. 75-87; no. 32, pp. 95-96; pp. 143-145 (no. 48); no. 56, pp. 161-164; nos. 61-63, pp. 181-194.

of a practical ideal in conformity with the most essential object of social life, Stammler maintains the principal idea of natural law, which aims to satisfy the unrestrainable need of finding a deeper foundation for the juristic rule than the arbitrary will of man. And while he thus reacts against juristic positivism, he at the same time escapes the objections that have long been formulated and have been recently renewed, with rigorous opposition, by Bergbohm,¹ against the doctrine of a legal philosophy which had been maintained or unconsciously followed up to that time.² The eminently *critical* "spirit" of the work itself would suffice to assure it the substantial value merited by every movement of ideas which aims to liberate us from a depressing intellectual servitude, and is able to glimpse or foresee, in order to guide them, the aspirations converging to the point whence must come the new creative epoch.³

But Stammler has pushed his effort further, in trying to characterize this juristic ideal, which he elevates above the life of humanity. He conceives it as a unitary and generally valid "form," intended to determine, by giving it firm, precise and regular outlines, a contingent, flexible

¹ *K. Bergbohm*, "Jurisprudenz und Rechtsphilosophie," I Band, Einleitung, Abhandlung I. "Das Naturrecht der Gegenwart," Leipzig, 1892.

² This point has been particularly emphasized by *L. von Savigny* ("Das Naturrechtsproblem und die Methode seiner Lösung"), in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, of *G. Schmoller*, vol. XXV, pp. 407-417 (pp. 25-35 of the second Heft). See also *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, p. 112, pp. 117-118.

³ This important, though still somewhat vague merit has been recognized even by the most decided critics of Stammler. See especially, *M. Weber*, in *Archiv für Sozialwissenschaft*, 1907, vol. XXIV, N. F. vol. VI, pp. 94-96. *Staffel*, in *Jhering's Jahrbücher*, 1906, vol. L, Zw. F. vol. XIV, pp. 301-302, 315, 322. *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," Berlin and Leipzig, 1909, pp. 5, 9-10, 37. *G. Fraenkel*, "Die kritische Rechtsphilosophie bei Fries und bei Stammler," *Göttingen*, 1912, pp. 7-8 (no. 1), pp. 27-28 (no. 13), pp. 45-46 (no. 26), p. 48 (no. 27), pp. 91-92 (no. 54). *F. Berolzheimer*, in *Archiv für Rechts- und Wirtschaftsphilosophie*, 1911-1912, vol. V, p. 320.

and unceasingly changing "matter," which is furnished by the historical and empirical data of social life. This again, despite the theoretical objections which have been raised against it,¹ denotes a profound view and one susceptible of valuable results, for it follows from it that without a material basis, the idea of law is nothing but an empty shell, that the content of this shell is imposed by circumstances of fact, without the data of which the ideal lacks all substantiality, and that, finally, "just law" reduces itself to a sort of powerful breath which must animate an unconscious substance that is there beforehand.²

This is not all. Stammler defines his ideal as a "*social ideal*," i.e. one that must remain free from the deformations of subjective desires, and must aim to assure the objective mission of human society in its most essential aspect by harmonizing the needs and aspirations of all in one higher aim. Now it has been claimed that there is nothing here but an empty tautology.³ Nevertheless, I think there is a fertile idea here. Though not altogether new, it has, at least, been accentuated and formulated by Stammler in a way which fits it to the demands of the hour, and which enables "just law" to be maintained

¹ See especially *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," 1909, pp. 10, 32. *F. Berolzheimer*, ("Eine Rechtswissenschaft der Theorie") in *Archiv für Rechts- und Wirtschaftsphilosophie*, 1911-1912, vol. V, p. 319.

² Cf. *L. von Savigny*, in *Jahrbuch für Gesetzgebung . . .* of *G. Schmoller*, 1901, vol. XXV, pp. 428-434 [pp. 46-52 of the 2nd Heft]. This idea of a substantial form as being characteristic of law, has been specially developed, from even a more strictly logical point of view, by *Giorgio del Vecchio*, "I presupposti filosofici della nozione del diritto," Bologna, 1905, *passim*, especially pp. 109-133, 165-188. "Sull' idea di una scienza del diritto universale comparato," 2nd ed. Torino, 1909, § II, pp. 14-16. Add, by the same author, "Il concetto del diritto," Bologna, 1906. "Il concetto della natura e il principio del diritto," Torino, 1908. "Sulla positività come carattere del diritto," Modena, 1911.

³ See especially, *M. Liepmann*, "Einleitung in das Strafrecht. Eine Kritik der kriminalistischen Grundbegriffe," Berlin, 1900, p. 26, note 1. *H. U. Kantorowicz*, "Zur Lehre vom richtigen Rechte," 1909, pp. 30-31. *G. Fraenkel*, "Die kritische Rechtsphilosophie bei Fries und bei Stammler," Göttingen, 1912, pp. 28-29 (nos. 14-15).

within certain directing lines, capable of assuring its influence upon life.¹

To these substantial merits are added, in the *manner* itself in which Stammler develops his doctrine, a penetrating view of realities, a profound sentiment of moral rectitude, an inspiration at once high and in conformity with actual needs, a ready adaptation of ideas to facts, in short a host of eminent qualities which, by the confidence which they suggest, irresistibly lead the mind to the centre of truth which one feels is enclosed in this masterly work.

16. How is it then, after all, that with merits so rare, and premises so vigorous, the effort of Stammler, when it is translated into precepts intended to realize his method, and more particularly still, when it comes down to the applications demanded by the concrete questions of juristic life, does not seem to come to anything and leaves a great disappointment? For it must be admitted that that is the case. If we admire the masterly way in which Stammler embraces in his imposing schema, a thousand minute difficulties of practice, and the skilful fingering with which he unravels their network, we remain, nevertheless, imbued with a strong feeling that these solutions do not issue spontaneously from the principles laid down in advance, that they are rather suggested by variable considerations, by a more ordinary teleology, of subjective origin in a good many cases, that they remain very far from the pretended point of departure,² and that sometimes even, as has been shown, they tend by their contra-

¹ Cf. *L. von Savigny*, in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, vol. XXV, 1901, p. 414 (p. 25 of the 2nd Heft). *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, pp. 119-120. See especially *Isaac Breuer*, "Der Rechtsbegriff auf Grundlage der Stammlerschen Sozialphilosophie," Berlin, 1912.

² See especially the examples cited by *G. Fraenkel*, "Die kritische Rechtsphilosophie bei Fries und bei Stammler," Göttingen, 1912, §§ 17-19, pp. 32-37. Add, *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," Berlin und Leipzig, 1909, pp. 33-35, 36-37.

dictions to break down what seems to serve as their basis.¹

From the point of view of a judicious philosophy of the sciences, critics have been able to find in the personal mode of exposition of Stammler, methodical vices, which explain, in a large measure, the relative failure of his undertaking. Amidst the abundant detail of different instances, they may be reduced to a few essential characteristics: abuse of the analysis of concepts, which leads only to analytic judgments, incapable as such of extending our knowledge; extreme logicism, due to absence of intuition, and aggravated by an insufficient abstraction, a logicism in which the non-contradiction of concepts is the only criterion of their truth, without regard to their intrinsic value; more generally still, non-recognition or even ignorance of sensible, aesthetic and moral values, so as to assure the exclusive predominance of the pure idea over reality; whence results a constant confusion between a demonstration based upon a logical chain of propositions and a proof of their truth.² And if we carry the criticism further back, we recognize without great difficulty that the greater part of these defects are due in turn to certain dangers inherent in the philosophy of Kant, which Stammler followed too exclusively, and even sometimes exaggerated and modified.³

¹ See *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, pp. 120-124. Cf. *L. von Savigny*, in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, 1901, vol. XXV, pp. 417-419 (pp. 35-37 of the 2nd Heft), observing, in order properly to appreciate the criticisms of this author, that his article was published in 1901, before the appearance of "Die Lehre von dem richtigen Rechte," which came out in 1902, and in reality was simply based upon the data of the first edition of "Wirtschaft und Recht nach der materialistischen Geschichtsauffassung" (1896. Second ed. 1906).

² *G. Fraenkel*, "Die kritische Rechtsphilosophie bei Fries und bei Stammler," Göttingen, 1912, §§ 20-25, pp. 37-45 and 47-48 (no. 27). *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," Berlin und Leipzig, 1909, p. 13, 14, 23-29.

³ Cf. *Staffel*, in *Jherings Jahrbücher*, 1906, vol. L, N. F. vol. XIV, pp. 302-321. *G. Fraenkel*, op. cit. pp. 7-8 (no. 1), p. 38 (no. 20), p. 47 (no. 27), pp. 91-92 (no. 54). *Kantorowicz*, op. cit. p. 13.

Independently of these considerations, which concern especially the methodological procedure of the work, and render an account in some measure of its faults, I believe that from a more pragmatic point of view, looking more closely upon the results, we can find in these latter themselves the secret of their insufficiency, which is more likely to enlighten us regarding the definitive value of Stammler's effort, in relation to the establishment of the scientific bases of positive law, which is the essential object of this part of our work.

One may perhaps think at first that Stammler tried to do the impossible, namely, to embrace in a philosophic ideal the most minute questions of actual life. And I grant that, as I intend to show later,¹ it is really too much to demand of principles suggested by consciousness or experience proper, that they should enable us, by means of successive deductions, to draw from them a direct and convincing reply for the solution of legal difficulties raised by the manifold incidents of the daily existence of men living in society.

But in provisionally condemning this principal point, or rather, in admitting that one can easily, by means of considerations which will be presented later in the course of this work,² rectify the excess of regulation outlined by Stammler and retain the fundamental idea of his system, without pushing its detailed application so far — it remains true that, despite everything, the practical conclusions of "just law" seem far distant from the point of departure, and it is hard to see the logical bond which can unite them with irresistible necessity. And I think that one may give two principal reasons for this incongruity which, to my mind, irremediably spoils the work of Stammler.

¹ See below, in this second part, the ninth chapter (XIV), especially no. 177, and our third part [not here translated].

² See further the third part of the present work [not here translated].

On the one hand, Stammler has not made up his mind clearly concerning the relations of "richtiges Recht" ("just law") and the positive law of a given country and time. The explanations which he has attempted to give in this connection are after all, as I indicated above,¹ vague and confused. Does Stammler really admit that "just law" effectively dominates social life to the extent of imposing itself upon the jurist as well as the legislator, and of giving to the practice of law, viewed in its largest aspect, the natural and scientific basis which is necessary to its complete effectiveness? He has nowhere said so clearly.² And if we do not know this, we do not see what he means when he tries to adapt his ideal to practical life. Hence there is in his whole work a vagueness that is extremely painful for one who tries to comprehend the law in its dynamic function. This, however, may be merely a feeling of intellectual discomfort which one may try to overcome by defining to oneself the point of view which Stammler has not been able to present clearly.³

But on the other hand, and this is the important point, the exclusively formalistic and logical analysis of Stammler condemned his undertaking to inevitable sterility as soon as he descended from the region of concepts and formulae and took up bodily the social realities.⁴ In fact, the entire effort of Stammler's legal philosophy exhausts

¹ See above pp. 511-513 (no. 6).

² *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, p. 118, attributes on this point a decided position to Stammler for which, to my knowledge, the latter has not declared himself.

³ This is what I have tried to do above, pp. 511-513 (no. 6). Cf. *Staffel*, in *Jherings Jahrbücher*, 1906, vol. L, N. F. vol. XIV, pp. 312-315, and *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, pp. 118-119 (§ 7), p. 146 (§ 10) and §§ 10-12, pp. 146-214.

⁴ This impression of mine was definitely confirmed on reading the rigorous criticism of Stammler, made by *H. U. Kantorowicz*, "Zur Lehre vom richtigen Rechte," Berlin und Leipzig, 1909, pp. 10-31. This charge, however, a trifle heavy, against the logical bases of the system, appears in its positive results to be scarcely anything more than a defence (powerless, I am convinced) of the "jurisprudence of sentiment." See especially pp. 23-29. The reader may compare with advantage, on this point, the more moderate and judicious

itself in analyzing ideas, in defining distinctions, in laying down criteria, in paring down and refining definitions. Thus his principal value and chief merit are due to the formulae he has elaborated, of striking fulness and finished stamp. But they are abstract formulae, aiming simply at unity, generality, and universal validity. Hence if you try to adapt them to the tangible circumstances of life they refuse their service; at the very least they show themselves unequal to the task, because they demand of the facts a "deconcretization" that is impossible to attain. We must therefore address ourselves to less ambitious considerations, which have almost nothing in common with the ideal laid down beforehand. Hence there is a disconcerting antinomy between the programme and its realization. This antinomy is already visible in the hieratic, dry, untranslatable and really unassimilable form of the famous *principles of "just law,"* which are, besides, simply affirmed without ever being proved, and, as has been stated, recall the universal moral maxims of Kant,¹ without lending themselves as easily to practical application.² The same antinomy is further accentuated in connection with the *typical model of "just law,"* which hardly does anything but add a new formula to all the others. And the ingenious dialectic of Stammler does not succeed in fructifying its sterile abstraction.³ Finally the antinomy is complete, and shows itself strangely disappointing in the applications of the doctrine, where we can see the entire independence of the concrete solutions from the

criticism of *Staffel* (in Jherings Jahrbücher, 1906, vol. L, N. F. vol. XIV, pp. 312 and 315-322), which, starting also from the methodological philosophy of *Windelband*, *Rickert*, *Simmel*, tries to introduce into the system of Stammler the moral notion of value, and does not bring in sentiment except to lay the basis for the effort of the intellect.

¹ *L. Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907, pp. 120-123.

² *H. U. Kantorowicz*, op. cit., pp. 31-35. *G. Fraenkel*, "Die kritische Rechtsphilosophie bei Fries und bei Stammler," Göttingen, 1912, § 15, pp. 29-31; cf. 46 (§ 26).

³ *H. U. Kantorowicz*, op. cit., pp. 35-36. *G. Fraenkel*, op. cit., § 16, pp. 31-32; cf. p. 46 (§ 26).

preconceived formulae, and the preponderance of particular elements of decision over the faraway generality of the ideal conceptions.¹

17. Accordingly those critics who, not content to call attention to the defects of the work, have undertaken to correct its errors or to fill its lacunae, have brought all their efforts to bear upon the discovery and definition of positive and concrete elements, taken from social reality rather than from abstractions of thought, such as would consequently be more capable of "humanizing" the notion of "just law," and adapting its formula to the content of social life which it is to control.

Some of them, indeed, have only been able to call attention to the necessity of establishing a bridge between the empirical realities and objective justice, without giving us the necessary materials for its construction.² Others, following the inspirations of the more liberal criticism of Windelband and Rickert, have at least tried to show how in the cultural sciences ("Kulturwissenschaften" as opposed to "Naturwissenschaften"), the notions of value and purpose must make moral and social progress predominate over the purely logical order of concepts.³ Others still have thought that the system of Stammler can not be made valid except by illuminating it with the reflection of a frankly realistic philosophy which brings us back very near to the positions of the classical Law of Nature.⁴

¹ *H. U. Kantorowicz*, op. cit., pp. 36-37. *G. Fraenkel*, op. cit., §§ 17-19, pp. 32-37.

² See for ex. *L. von Savigny*, "Das Naturrechtsproblem und die Methode seiner Lösung," in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, of *G. Schmoller*, 1901, vol. XXV, pp. 407-437 (pp. 25-55 of the 2nd Heft), especially pp. 417-419 [35-37], p. 425 [43], 427 [45], 428-434 [46-52].

³ See *Staffel* ("Ueber Stammlers 'Lehre vom richtigen Recht'") in *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*, 1906, vol. L (Zweite Folge, vol. XIV), especially pp. 315-319. Add pp. 320-322. Cf. *H. U. Kantorowicz*, "Zur Lehre vom richtigen Recht," Berlin und Leipzig, 1909, pp. 13, 23-29.

⁴ In this sense, *G. Fraenkel*, "Die kritische Rechtsphilosophie bei Fries und bei Stammler," Göttingen, 1912, §§ 37-54, pp. 66-92.

Among all these efforts, it is proper to call particular attention to the work of L. Brütt on the art of juristic interpretation,¹ as having tried, in the most decided manner perhaps, to make more flexible the doctrine of the master by enriching it with the durable acquisition of contemporary movements of ideas, and to assure it a precise effectiveness by introducing its results in the practice of the law itself. Without analyzing this work in detail, illuminated though it is with ingenious and profound views, and pervaded by an extremely broad spirit, I merely intend to state here that, led by his subject to go back to the highest elements of law, L. Brütt takes for his basis the critical view of Stammler, and wishes to animate it with a purely realistic spirit.² Thus, while retaining the social ideal as a simple analytic principle which can only circumscribe and limit the investigation,³ he substitutes for the principles and typical model of "just law," the following criterion, which seems to him more complete and more fruitful: "That law is just which pushes as far as possible the development of the people's civilization, and which contributes in the best way to making the national forces pass from potentiality to actuality." It is understood of course that the word "development" in the above formula can not mean a simple chronological process, but it signifies a change in the sense of a greater differentiation and a more perfect integration. And the word "civilization" must be viewed in its total aim as comprehending the interests of an ideal order together with the purely material needs.⁴ Then, feeling that there is still a vagueness inherent in such a criterion, and that it can not be corrected by the positive law,⁵ which he clearly recognizes

¹ *Lorenz Brütt*, "Die Kunst der Rechtsanwendung," Berlin, 1907.

² *L. Brütt*, op. cit., pp. 111-119, 120-124 (§§ 6 and 7).

³ *L. Brütt*, op. cit., pp. 119-120 § 7).

⁴ *L. Brütt*, op. cit., pp. 125-138 (§ 8).

⁵ *L. Brütt*, op. cit., pp. 138-139 (§ 8); cf. pp. 14-17 (§ 1) and § 2, pp. 18-23.

as having the character of a technical discipline, he emphasizes, in order to put a check upon the excesses of a subjectivism inevitable in itself, the importance of "*intermediate ends*," — such as the economic development, all things being equal, of the means of production, the struggle against the exploitation of home laborers, etc. — on which one can easily agree, except for the question of the means of realizing them without prejudicing other essential interests.¹

We may appreciate from a pragmatic point of view the results of his "transpositive" judgments of value,² as compared with the idealistic interpretation of Stammler, by comparing the casuistic study as outlined (too lightly) by L. Brütt, of the restrictions upon the freedom of juristic acts, due to the idea of good morals,³ with the analogous developments, summed up above, of the author of "just law."⁴ We shall then see, I think, without difficulty that after all the disciple is far from attaining the height of the master.

Moreover, whatever be the success of these attempts at improvement of a doctrine too personally forceful to bear retouching, our attitude at the end of our critical examination of the work of Stammler is that if it furnishes a valuable guide for placing the scientific elaboration of law in view of its proper object, it is insufficient to give it the elements necessary to sustain it, and it leaves entirely open the problem of its adaptation to the demands of life.

¹ L. Brütt, *op. cit.*, pp. 139-140 (§ 8).

² L. Brütt, *op. cit.*, pp. 146 and 148-149 (§ 10).

³ L. Brütt, *op. cit.*, pp. 202-212 (§ 12).

⁴ See above, pp. 527-539 (nos. 11-13), especially no. 13, pp. 532-539.

APPENDIX II

STAMMLER AND HIS CRITICS

By JOHN C. H. WU¹

"Hands off: neither the whole of truth nor the whole of good is revealed to any observer, although each observer gains a partial superiority of insight from the peculiar position in which he stands. Even prisons and sick-rooms have their special revelations. It is enough to ask of each of us that he should be faithful to his own opportunities and make most of his own blessings, without presuming to regulate the rest of the vast field." — *William James*.^{1a}

THE Stammlerian philosophy of law represents the culminating point of a long development of juristic thought in Germany, just as the sociological jurisprudence may be said to sum up more than a century of juridical experience in America. That this should have been the case is by no means accidental. Indeed, the explanation is not far to seek. Philosophy has found its most congenial soil in Germany, while sociology has become the American science par excellence. Jurists, as a rule, employ the apparatus they find ready at hand, and the tone of their work is largely determined by the character of their audience, — by their social and intellectual milieu. In assimilating ideas from other sources, they are gener-

¹ Professor of Law at the Comparative Law School of China; Lecturer on Political Science at the Chinese National Institute of Self-Government.

^{1a} *James*, "Talks to Teachers on Psychology: and to Students on Some of Life's Ideals," p. 246. The essence of James' philosophy seems to lie not so much in his pragmatism as in his gospel of relaxation. It is a good sign that to-day some of us no longer look at life as a "map," but as a "dance." This may sound profane to the older generation; but, as for me, after many years' voluntary exile in quest of the truth, I find myself, *malgré moi*, sympathizing with the words, though somewhat exaggerated, of Havelock Ellis: "In China, and in China alone among the great surviving civilizations, we find that art animates the whole of life, even its morality." "The Dance of Life" (1923), p. 27. May this century be a century of philosophical toleration and harmony.

ally governed by the "law of propinquity;" in disseminating their own ideas, they unconsciously follow the path of least resistance. In this sense, it may safely be asserted that there could be no such thing as a dislocated philosophy of law, — no picture can be separated from its background without losing its genuineness and spontaneous beauty. At any rate, even if we should agree with the Court of Windyville, immortalized by the excellent report of Wigmore,¹ that "thought is infinite and universal," we are still constrained to dissent from its ruling that therefore the philosopher's domicile is everywhere, so that he may be apprehended wherever he may chance to be.

Stammler's work is no mere speculation in the clouds; it is a lifelong endeavor to solve, not an imaginary, but a terribly real and earnest problem in the juridical and economic life of modern Germany. It is easy to criticize his philosophy or even to tear it to pieces, so long as one scrapes at its surface; but in order to sympathize with a thinker of such elemental greatness, one has to enter into the very depth of his soul and to realize exactly what it is that most agitates him and presses for an impending solution. It behooves us, then, to set up a brief genetical account of his juristic philosophy; for it is not until then that we shall be in a position to do justice both to him and to his critics.

I. GENESIS OF THE STAMMLERIAN PHILOSOPHY OF LAW

The history of German philosophy in the nineteenth century is full of monstrosities and pathological symptoms. Wild attempts to go beyond good and evil, to transcend the distinction of just and unjust, to legislate for the universe through a dialectic process, to seek salvation in non-existence, to view history as a workshop of economic

¹ *Wigmore*, "Professor Muensterberg and the Psychology of Testimony" (1909) 3 Illinois L. Rev. 403. That article is a piece of consummate art; Wigmore has danced very well with our Mistress.

forces, still arouse in the impartial student of to-day a sense of uneasiness and disgust. It was in the midst of such scenes that Stammler was brought up. He was almost smothered by the thick dust suspended in the air. But, thanks to his moral constitution and philosophic insight, he did not fall a victim to the bad contagion. Egocentric and insolent philosophers idolized the State, worshipped brutal force and matter, and rationalized the "status quo." No, said the promethean Stammler, there must be a stop to this egotism, this materialism, this imperialism. Above the State, Law reigns supreme, and beyond Law, there is Justice. He is a philosopher of light; the misty notion of "the infinite night in which all cows are black" repelled him to the extreme. This feeling of repulsion was the beginning of his philosophy, and controlled and, to some extent, narrowed down the course of its future development.

But he is not only a man of righteous feeling; he was also a born scientist. So it was natural enough that he should try to clothe his innate intuitions in a scientific, critical and generally acceptable form. Here lie both the strength and the weakness of his philosophy. I say strength, because ideas do not count to-day without a sure, reasoned basis, and in order to convert a critical and positivist age to the message of right and justice, one has first to show that one possesses the critical and positivist spirit even in a greater degree than one's contemporaries. But this is also the source of weakness, for, in the very nature of things, it is impossible to establish¹ by logical arguments

¹ I use the word "establish" in the sense of satisfying our whole emotional and intellectual nature, or, at least, in the sense of generating "awareness," as to which see *Whitehead*, "The Principle of Relativity with Applications to Physical Science" (Cambridge, 1922), p. 14. It seems to me that arguments in support of absolute and immutable justice are like those for God's existence. "If you have a God already in you, these arguments confirm you. If you are atheistic, they fail to set you right." *James*, "Varieties of Religious Experience," p. 437.

doctrines which we accept on instinct but cannot hope to prove.

Many vexatious controversies and misunderstandings might have been avoided, if only Stammler had applied his favorite motto: "Happiness lies in the pursuit of the goal"¹ to the fundamental basis of knowledge as well as to its superstructure. After all, ideal knowledge, both in its ultimate foundation and in its positive structure, is as unattainable a goal as ideal life.

I must not, however, be understood as casting reproach on my old master. In fact, the desire to exalt faith to the "good company" of science is indicative of a great mind. Did William James not attempt to conquer empirical souls by way of "radical empiricism?" But was his "radical empiricism" anything more than a new and fashionable name for the old "Pilgrim's Progress?" The same tendency is no less visible in my venerable kind friend, Judge Holmes, who would test the law by the measure of the "cynic" or even the "bad man." François Geny is a still better illustration; for he aspires to build his whole edifice or rather edification of natural law on the basis of "positivism;" and Tourtoulon sets out by denouncing teleology that he may end by justifying free will. And I know of a splendid master who would cite authorities after authorities, add note to note, and pour forth his almost inexhaustible store of erudition, in order to back up truths which he really brought with him. Kohler seems to be a little more dogmatic than the rest, but one can find the same spiritual conflict in him; for he grows impatient under the yoke of knowledge, loses his balance, and finally throws it away, crying out like a spoiled child: "To what purpose is knowledge, if the heaven of gods is empty, if poetry is dumb and art is blind?"²

¹ *Stammler*, "Fundamental Tendencies in Modern Jurisprudence" (1923) 21 Mich. L. Rev. 889.

² *Kohler*, "The Mission and Objects of Philosophy of Law" (1911) 5 Illinois L. Rev. 422.

I could multiply instances without end, but these, I hope, will suffice to bring to light the irony of the situation in which modern culture has involved us. Science is our legal spouse, but our secret love is often with some one else. But this is precisely where philosophy originates. Philosophy is by its very nature a Purgatory, in which seasons of doubt and hope salute us alternately; but it is, nevertheless, a genuine pleasure to try, half-playfully, half-earnestly, but always good-humoredly, to maintain a delicate equilibrium between the two. As Bertrand Russell has pointed out, "the greatest men who have been philosophers have felt the need both of science and mysticism: the attempt to harmonize the two was what made their life, and what must, for all its arduous uncertainty, make philosophy, to some minds, a greater thing than either science or religion."¹

Stammler is such a man, and his philosophy is just such an attempt. On the one hand, he is aware of the riddle of life; on the other hand, he has "the scientific habit of mind" which, in the words of Freud, is characterized by "the capacity to be content with approximations to certainty and the ability to carry on constructive work despite the lack of final confirmation."² While he has failed in a wider sense, in the sense, that is, that he has not offered any solution for the riddle of life and therefore of law, it still remains to ask whether he has succeeded within the bounds of philosophy. His philosophy is professedly a half-way house between the reality and our mind.³ His question is not whether we can embrace the

¹ Russell, "Mysticism and Logic and Other Essays" (1918), p. 1. Philosophy may be defined as "divine madness" restrained and balanced by cold reasoning.

² Freud, "Introductory Lectures on Psychoanalysis," transl. by Joan Rivière (1922), 39-40.

³ "Fundamental Tendencies," op. cit. supra, note 4, at p. 901, where he says that the theory of knowledge "takes an idea for granted and simply analyses it in its quality."

whole reality of law, but, taking law for granted, how far we can go with our logic in grappling with its problems.

II. CRITICS OF STAMMLER

Such a mass of literature has grown around Stammler's philosophy that it is practically impossible to enumerate all his critics, both friendly and hostile. The most important among them are: Bergbohm,¹ Krahmer,² Simmel,³ Fränkel,⁴ Eleutheropulos,⁵ Tönnies,⁶ Brütt,⁷ Wieland,⁸ Duncker,⁹ Moór,¹⁰ Laskine,¹¹ Schepper,¹² Lask,¹³ Weber,¹⁴ Kantorowicz,¹⁵ Barth,¹⁶ Vorländer,¹⁷ Natorp,¹⁸ Radbruch,¹⁹

¹ *Bergbohm*, "Jurisprudenz und Rechtsphilosophie" (Leipzig, 1892), 141 et seq.

² *Krahmer*, *Philos. Woch. Schr.* 146 et seq.; 164 et seq.; 210 et seq.; 362 et seq.

³ *Simmel* (1896), 20 *Jahrb. f. Gesetzgebung, Verwaltung u. Volkswissenschaft*, 575 et seq.

⁴ *Fränkel*, "Die kritische Rechtsphilosophie bei Fries u. bei Stammler" (Göttingen, 1912).

⁵ *Eleutheropulos*, "Soziologie" (Jena, 1904), p. 9 et seq.

⁶ *Tönnies*, "Rudolf Stammler" (1898), 4 *Archiv f. systematische Philosophie*, 109 et seq.

⁷ *Brütt*, "Die Kunst der Rechtsanwendung" (Berlin, 1907), 112 et seq.

⁸ *Wieland*, "Die historische und die kritische Methode in der Rechtswissenschaft" (Leipzig, 1910), 24 et seq.

⁹ *Duncker*, "Stammlers Lehre vom richtigen Recht," 1 "Die Reformations," 482 et seq.

¹⁰ *Moór*, "Stammler helyes jogról szóló tana" (Budapest, 1911).

¹¹ *Laskine* (1909-1912), *L'Année sociologique*, 328 et seq.

¹² *Schepper*, "Nieuw-Kantiaansche Rechtsbeschonwing" (Haarlem, 1917).

¹³ *Lask*, "Rechtsphilosophie," in "Die Philosophie im Beginn des zwanzigsten Jahrhunderts," 2 Aufl. (Heidelberg, 1907), p. 279 et seq.

¹⁴ *Weber*, "R. Stammlers 'Ueberwindung' der materialistischen Geschichtsauffassung" (1907), 24 *Archiv f. Sozialwissenschaft u. Sozialpolitik*, 94 et seq.

¹⁵ *Kantorowicz*, "Zur Lehre vom richtigen Recht" (Berlin, 1909).

¹⁶ *Barth*, "Die Philosophie der Geschichte als Soziologie" (Leipzig, 1915), 24 et seq.; 595 et seq.

¹⁷ *Vorländer*, "Rudolf Stammlers Lehre vom richtigen Recht" (1903), 8 *Kantstudien*, 329 et seq.

¹⁸ *Natorp* (1913), 18 *Kantstudien*, 1 et seq.

¹⁹ *Radbruch*, "Grundzüge der Rechtsphilosophie" (Leipzig, 1914), 21 et seq.

Croce,¹ Geny,² Saleilles,³ Berolzheimer,⁴ Kohler,⁵ Pound,⁶ Simkhovitch,⁷ Tanon,⁸ Wielikowski,⁹ Breuer,¹⁰ Binder,¹¹ Kaufmann,¹² Sauer,¹³ Mayer,¹⁴ Hocking.¹⁵ For the sake of convenience, the critiques may be divided into three classes: (1) Sociological, (2) Philosophical, (3) Juristic. I shall select three critics to represent each class: (1) Weber, Kantorowicz, and Simkhovitch; (2) Wielikowski, Binder, and Natorp; (3) Saleilles, Geny, and Pound.

1. *Sociological Critiques*

(1) *Max Weber* — The situation of modern social science has been ably brought out by Professor Small in the following words:

"One of the darling dogmas of modern scientific purism is that in dealing with facts judgments of the value of facts must be strangled. It would be hard to find a very clear case of strict obedience

¹ *Croce*, "Historical Materialism and the Economics of Karl Marx" (New York, 1914), 27 et seq.

² *Geny*, "Science et Technique en Droit privé positif" (Paris, 1915), II, 127 et seq.

³ *Saleilles*, "École Historique et Droit Naturel" (1902), 1 *Revue Trimestrielle du Droit Civil*, 96 et seq.

⁴ *Berolzheimer*, "The World's Legal Philosophies" (Modern Legal Philosophy Series), 392 et seq.

⁵ *Kohler*, "Philosophy of Law" (Modern Legal Philosophy Series), 26. In the second and third German editions this criticism is omitted.

⁶ *Pound* (1911), 25, *Harvard L. Rev.*, 147 et seq.

⁷ *Simkhovitch*, "Rudolf Stammler" (1904), *Educational Review*, vol. 27, 236 et seq.

⁸ *Tanon*, "L'Evolution du Droit et la Conscience Sociale," 3 édit. (Paris, 1911), 77 et seq. An English translation of this part is published as an Appendix to *Ihering*, "Law as a Means to an End," 475 et seq.

⁹ *Wielikowski*, "Die Neukantianer in der Rechtsphilosophie" (Muenchen, 1914).

¹⁰ *Breuer*, "Der Rechtsbegriff auf Grundlage der Stammlerschen Sozialphilosophie" (1912), *Kantstudien* (Ergänzungshefte, No. 27).

¹¹ *Binder*, "Rechtsbegriff und Rechtsidee: Bemerkungen zur Rechtsphilosophie R. Stammlers" (Leipzig, 1915).

¹² *Kaufmann*, "Kritik der neukantischen Rechtsphilosophie" (Tübingen, 1921).

¹³ *Sauer*, "Neukantianismus und Rechtswissenschaft in Herbststimmung," 10 *Logos*, 162 seq.

¹⁴ *Mayer*, "Rechtsphilosophie" (Berlin, 1922), 20 seq.

¹⁵ Prof. Hocking's critique is still in manuscript, en route to publication. I have had the pleasure of reading it over.

to the dogma, yet it stands high in the formal scientific code. Of course it is the opposite swing of the thought-pendulum from the method of conscienceless homiletical impressment of snap judgments about facts into the service of opinion. One cannot draw accurate boundaries for such tendencies in a sentence, but it is within limits to say that this 'edifying' way of treating supposed facts to the prejudice of valid description and analysis was the rule rather than the exception in the eighteenth century. The coming of criticism to its own in the nineteenth century might be described with some approach to fairness as an inversion of the order of prominence previously assigned to description on the one hand and to evaluation on the other. The older method went so far that it permitted valuations to create their own facts. The reaction went so far that it invaded the right of facts to be evaluated."¹

In this light, Weber's critique can be fully understood. Weber represents the so-called "scientific purism," while Stammler marks the coming of criticism to its own. Weber holds that only the natural sciences can claim exactness and objectivity, while in cultural sciences, that is, in the realm of ends and norms, everything is subjective. Stammler, on the other hand, contends that both natural and cultural sciences are governed by objective principles, the former by the law of causality, and the latter by the principle of teleology.² For Weber, economic and social policy cannot be determined on a "scientific" basis, because all value-judgments "change in the course of history with the character of the culture and of the ideas governing men."³ Stammler agrees, of course, with the latter part of the statement, but he does not admit that therefore social science is not "scientific" and can lay claim to no objectivity. The very proposition that value-judgments change with time and place, if it is true at all, is an objective truth. Weber fails to see the all-important dis-

¹ *Small*, "The Meaning of Social Science" (Chicago, 1910), 214.

² Cf. *Stuart*, "Valuation as a Logical Process," in *Dewey*, "Studies in Logical Theory" (Chicago, 1909), 227 seq.

³ *Diehl*, "The Life and Work of Max Weber" (1923), 38, "Quarterly Journal of Economics," 94.

inction between the object-matters of a science and the propositions concerning them. Even in the natural world, everything is in a flux, and the very laws of physics express no more than relations and deal with "ifs;" but, nevertheless, the law of causality remains constant. So in the realm of ends, while subjective standards may and must change, the principle of teleology is always valid. As long as the distinction between the object-matters and propositions is kept in mind, there is no real difference in point of objectivity between natural and cultural sciences. For all propositions are subject to the two logical principles: 1. The Principle of Disjunction — A proposition cannot be both true and not true. 2. The Principle of Alternation — A proposition must be either true or not true.

These principles govern with equal force the natural and cultural sciences. Thus, Stammler's position cannot be attacked by exalting natural at the expense of cultural sciences, since both of them derive their objectivity ultimately from the same source. If it is to be attacked at all, it must be done by questioning the objective validity of the two logical principles and therefore of science in general. This, certainly, has not been attempted by Weber. On the contrary, by naively holding up the natural sciences as the pattern of exactness and objectivity, Weber appears to be at once too dogmatic and too sceptic; and such, indeed, is the dilemma in which all "scientific purists" are inevitably involved.

(2) *H. U. Kantorowicz* — Kantorowicz starts by recognizing Stammler's "immortal" contribution to the science of law. According to him, that contribution consists in having sought to strike out a "golden mean" between the utopian rashness of the eighteenth-century theories of natural law and the uncritical phlegm of the historical school, and to create a generally valid method of determining what is just and right for any particular time and

place.¹ He gives Stammler the credit of having been the first who felt the need of a reconstruction in modern jurisprudence, and who announced as a desideratum for juristic thinking the "epoch-making" idea of a "natural law with a changing content." Stammler gave a strong impetus and laid down a proper orientation to the jurists of the twentieth century. But this is all that can be said of him; for, in Kantorowicz's opinion, he has not succeeded in making right use of his own impetus or to follow up his own orientation. In fine, Stammler's merit lies in having called attention to the problem rather than in having solved it, for it cannot be solved by the critical method.

We may ask, then, what is Kantorowicz's substitute for the critical method. He proposes "to study the historical chain of subjectively valid ideals of law by the aid of historic-realistic method, to explain their causal relations, and to arrange their elements in proper order with reference to their relative values as means to ends, without pretending to evaluate the ideals themselves, or expecting to estimate the precepts corresponding to the ideals in any other light than their capacity to satisfy the sentiment of justice (to be psychologically analysed) of an empirically given stage of civilization."² I confess that his meaning of this long sentence does not appear perfectly clear to me. So far as I understand it, the gist of its argument is that ideals are not to be judged by their intrinsic value, but by their relative capacity to help realizing certain ends. But this seems to me to be moving in a vicious circle; it has not solved the problem, it has merely shifted the difficulty from one point to another; for, if ideals are mere means to ends, we are driven to the question what the *ends* are and how they are to be determined. This line of thinking, then, does not land us anywhere; it is simply an unconscious groping. No less

¹ Op. cit., supra note 23, p. 9.

² Ibid., 37.

empirical a thinker than Berolzheimer spoke of the "dangers of a sentimental jurisprudence;" ¹ and I do not hesitate to say that "Gnaeus Flavius" ² belongs to that group of jurists who, being victims of idea-phobias, ³ would deny objective validity to all theories, — apparently including their own. In so doing, they repeat the tragedy of Samson.

In another place, Kantorowicz criticizes Stammler as having followed Socrates in placing knowledge in a parallel with good, and ignorance on the same plane with evil. He holds that "the inquiry after the 'objective' in the realm of oughtness does not rest on an object-matter possessing reality," ⁴ and therefore cannot be adopted by his "realistic" method. Like Weber, he would reserve objectivity to the natural sciences alone. This point has been disposed of in the foregoing pages. But in order to deal a further blow to this naïve way of thinking, it may not be out of place to quote a significant passage from W. E. Johnson:

"The distinction between a descriptive or causal account of psychological or sociological matters, and an examination of standards or norms, is nowadays of the first importance, inasmuch as the substitution of *causal description* in the place of *evaluation of standard* has been woefully common in works which profess to found ethics upon psychology or sociology."⁵

(3) *V. G. Simkhovitch* — Simkhovitch, an authority on Marxian economics, was a student of Stammler. In many respects, I think that his critical estimate (made in 1904) of Stammler's contribution to economic thought may be depended upon as the last word. I take the liberty to

¹ See *Berolzheimer*, "Die Gefahren einer Gefühlsjurisprudenz in der Gegenwart" (Berlin, 1911).

² *Gnaeus Flavius*, "Der Kampf um die Rechtswissenschaft" (Heidelberg, 1906).

³ Cf. *Cohen's* Editorial Preface to *Tourtoulon*, "Philosophy in the Development of Law" (Modern Legal Philosophy Series), p. xxiii.

⁴ *Op. cit.*, supra note 23, p. 26.

⁵ *Johnson*, "Logic" (Cambridge, 1921), I, 226.

reproduce here some passages which specially deserve our attention:

"Stammler's attitude towards the Marxian doctrines was very much the same as Friedrich Albert Lange's attitude towards metaphysical materialism. He respected them. This respectful attitude of Stammler towards Marxism had, as we shall see, results not of merely local and theoretical, but of great practical significance. He defeated Marxism on its own grounds, and the Marxists were obliged to acknowledge their defeat. . . .

"It was in the fall of 1895 when Stammler's first great work left the press. It was called '*Wirtschaft und Recht nach der materialistischen Geschichtsauffassung: Eine sozialphilosophische Untersuchung.*' . . .

"According to Stammler the Marxian philosophy is infinitely superior to the historical school of law with its mystical historical '*Volkseele*' and to the ethico-historical school of economics with its confused and subjective teleology. . . .

"But Stammler shows that the basal formula of the Marxian system contains logical errors. Marx understands under production the technique of economic life. The science of technique is however a consideration for the natural sciences only. Should it be understood not in the sense of abstract science, but in the sense of technique actually applied by society in its working for the satisfaction of its needs, then it presupposes already the outward form, the framework of law, usage, and custom. No social life . . . can express itself outside of this framework. Law and custom are the logical prius, and social production is only possible within these limits.

"It is further an entirely unwarranted and arbitrary assumption that needs of society are entirely of a materialistic economic nature, and that all other ideas of humanity, ideas of right and wrong, æsthetic and religious ideas are necessarily causally dependent on the so-called '*material*' wants and the conditions of production. . . .

"Causality is impotent to offer us a law for our aims, a formula for the kind of outward norms."¹

In a certain sense, however, one can never "defeat" such a vital movement as Marxism by logical weapons. It is a commonplace that life is too subtle a thing to be governed by logic. The very pretence on the part of

¹ Op. cit., supra note 33, 240-246.

Marxism to being "scientific" is motivated by ulterior interests and supported by inarticulate emotions. As Spinoza has so well said, one emotion can only be conquered by another; so that logic must be transformed into emotion before it can take effect in the practical life. In the present case, whatever transformation there is has been effected partly through *estoppel* (that is, by the fact that, having pretended to being "scientific," the adherents of Marxism were estopped from refusing to consider any refutation which should claim to be logical), and partly through *sublimation*. Simkhovitch tells us how it was effected:

"Stammler, while a practical jurist, is above all an abstract thinker. He has never taken part in practical politics, but his theories, strange as it may seem to an American, have had a profound influence on Germany's political situation. Under the influence of Stammler's work the theorists of the German Social-Democracy, with Edward Bernstein, Conrad Schmidt, Ludwig Woltman in the lead, started the movement 'Zurück zu Kant' and gradually are being transformed from a revolutionary socialist party to a peaceful social-reform party. The more progressive and influential members of the party have abandoned the Utopia of a communistically-organized society and adopted as their aim the abstract Ideal of Social Justice and the forward movement toward this ideal as their watchword."¹

2. *Philosophical Critiques*

(1) *G. A. Wielikowski*. — Stammler analyzes consciousness into two elements: Impression ('Wahrnehmen') and Will ('Wollen'). As used by Stammler, 'Wahrnehmen' is extended to all cases where one perceives, understands, or remembers something; and 'Wollen' to all cases where one wants, desires, aims at, or attempts to accomplish, something. For instance, in our everyday conversation, the element of 'Wahrnehmen' is present whenever we say "I see," and the element of 'Wollen' is present when-

¹ Ibid., 250-251.

ever we say "I am going to do that." Stammler's conception of Law is based upon this analysis; it is formulated by a process of elimination in the following manner:

CONSCIOUSNESS

Impression	Will
individual	social
inductive	compulsory
arbitrary	inviolable

Thus, the conclusion is drawn: Law = inviolable, compulsory, social, will.

If the division of consciousness into the above two categories be correct, then what follows would seem to be unchallengeable. Since law is clearly not an impression, therefore it must fall under the other column. But Wielikowski questions the adequacy of the division itself, and offers the following classification:

MENTAL LIFE

Impression	Oughtness	Valuation	Will
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He argues that to define law in terms of will, i.e., purpose-arrangement, does not exhaust the possibilities of juridical life. For "there are certain phenomena in the life of law which spring from pure emotions; the totality of juridical experience does not run in conscious channels; many of its rudiments lie in the sphere of unconsciousness and sub-consciousness."¹ In order to give a complete explanation of law, one would have to take account of the instincts, the feeling of oughtness, and the more or less unconscious process of valuing.

Stammler's reply is briefly this: "Oughtness is nothing but a right will, and valuation is only a consideration of the serviceability of a certain means for the attainment

¹ Op. cit., supra note 35, p. 66.

of a determinate end."¹ Both of them, then, may be subsumed under will. Moreover, will need not always be consciously entertained. The will of a bird to escape from the boy chasing it might be generated quite spontaneously and unconsciously, but still it is a will. The will of men to imitate their neighbors' ways is nevertheless a will. Will in the sense of an uncaused mental event does not exist, — it would run counter to the law of causality. All acts of will are caused by something, but they are not any the worse for it.

Another answer to Wielikowski's criticism, which does not seem to have occurred to Stammler, is that they have two different things in mind, and therefore their controversy does not raise a real issue. Stammler was offering us a conception or connotation of the class-name "law." He was seeking after those essential and distinctive qualities which are logically implied in the term "law," in such a way that, if any of this set of qualities were absent the name would not be applicable, and any individual lacking them would not be regarded as a member of the class.² Wielikowski, on the other hand, was thinking of the concrete factors which may or may not enter into the *making* of a law.

The real merit of Wielikowski's critique, however, lies in his pointing to the *objective reference* involved necessarily in the conception of law, a reference of the existence of law, similar to the point, brought out by another critic, that "conception of law presupposes law which is conceived."³

(2) *Julius Binder*. — Binder does not agree with Wielikowski's objection to Stammler's division of consciousness into impression and will. But he differs from Stammler

¹ *Stammler*, "Lehrbuch der Rechtsphilosophie," 2 Aufl. (Berlin, 923), p. 55, note 8. For a fuller reply see 2 *Zeitschr. f. Rechtsphilosophie*, 154 seq.

² *Keynes*, "Formal Logic," 4 edit. (London, 1906), p. 23.

³ See 21 *Mich. L. Rev.*, 536.

on two important points: (i) that, since will is an empirical thing, therefore Stammler's definition of law, in which will finds a place, must also be empirical and not pure,¹ (ii) that the idea of justice and just law are identical, and, since there is no absolutely just law, there can be no absolute idea of justice.²

Stammler's answer to the first point is that the word "will" which he employs to define law does not signify a particular will, but will in general, that is, the quality of being a will.³ It denotes the second term of the formula: law = will. To the second point, his answer is that Binder's identification is a sheer confusion. A just law is always imperfect and of conditional significance, it can never embody in itself the absolute idea of pure community. But, while a positive law can never be absolutely just, it does not follow that there is no absolute idea of justice.⁴

To my mind, the first point can be answered in another way. We may grant that will is an empirical thing, but it does not necessarily follow that any definition making use of this word is an empirical thing. It is quite logical to argue that the *relation* expressed by the formula: law = will, if it is a true relation at all, possesses universal validity, although both *terms* of the relation are empirical things. As Kant says, "though all our knowledge begins with experience, it by no means follows that all arises out of experience."⁵ For lack of space, I will not develop this point any further.

(3) *Paul Natorp*. — Natorp's critique consists of a lucid exposition of the Stammlerian "Theory of Legal Science." For Stammler's vigorous thinking he expresses unbounded

¹ Op. cit., supra, note 36, p. 58.

² Ibid., 214.

³ Op. cit., supra, note 54, p. 63, note 1.

⁴ Ibid., p. 206, note 3.

⁵ Kant, "Critique of the Pure Reason" (Meiklejohn's Transl.), somewhere in the Introduction.

admiration. But if one is able to read between the lines, one will probably find Natorp secretly wishing that Stammler had retained the youthful passion and luxuriant style of his first great work on "Wirtschaft und Recht," so as to neutralize somewhat the excessive abstraction with which some of his critics, whether rightly or wrongly, have charged his "Theorie der Rechtswissenschaft."¹ The very praise which Natorp bestows upon the inspiring concluding chapter of the work betrays his slight dissatisfaction with the preceding parts.

The truth is that Natorp, in the last few years, has become more and more possessed with what Clifford called "cosmic emotion," while Stammler has been more and more purified in his logical reflection, until science has become his religion. While Natorp can now feel the truth of Goethe's words: "Nichts ist drinnen, nichts ist draussen, denn was innen, das ist aussen,"² Stammler has even abandoned his own beautiful figure of speech: "natural law with a changing content" as a bit of uncritical mysticism.³

3. *Juristic Critiques*

(1) *Raymond Saleilles*. — Saleilles was a popularizer of Stammler's "natural law with a changing content." But as has been seen, Stammler has abandoned this idea long ago. It will, however, be interesting to see what use was made of it by Saleilles. To Stammler, "natural law"

¹ Op. cit., supra, note 25, 78-79.

² See Natorp, in "Die deutsche Philosophie der Gegenwart in Selbstdarstellungen" (Leipzig, 1921), p. 24.

³ In the first edition of "Wirtschaft und Recht" (1896), the expression, "Ein Naturrecht mit einem wechselnden Inhalte," was used as the title of Section 33. In the second edition (1906) it was replaced by "Die Möglichkeit eines objectiv richtigen Rechtsinhaltes." The reason for this change lies in the ambiguity of the term, "natural law." Strictly, every law is positive; "Naturrecht" or "nicht-positivisches Recht" is a fire that burns not. But I see no objection to employing this word in the figurative sense, especially when we speak of "ius naturale" rather than "lex naturalis."

was an idea; in the hands of Saleilles, it was transformed into an emotion, a psychological demand, which is so deeply rooted in human nature that it has to be reckoned with by any political or economic theory which aims at any measure of success. Says Saleilles:

"The historical school was destined for failure for having wished to eliminate from the domain of law the idea of natural law. It refused to believe in that sociological law, according to which, if it is interests that lead the world, human beings have an interest, of sentimental order, it may be, but which is not on that account any the less indestructible, — the interest, namely, to reconcile the satisfaction of their economic needs with an ideal of justice and reason."¹

Such a utilitarian and romantic version of his doctrine met with anything but a hearty approval from the uncompromising Stammler. He loves truth better than popularity, and in this consists his greatness. But we must remember that Saleilles was himself an original thinker, and original thinkers are always bad apostles.

(2) *François Geny*. — We are told that Kant was called a "Prussian Hume" by some critics, and a "Platonic dreamer" by others.² Like Kant, Stammler represents such a delicate combination of comprehensiveness of outlook with minute, patient analysis, that it is no wonder if he should incur the same fate. To the denying spirits, Stammler's philosophy would seem to be a strange piece of make-believe; to the affirming spirits, on the other hand, he would appear to be a miserable, belated seeker after the unknown God. The former complain that he affirms a little too much, while the latter regret that he affirms much too little.

Geny belongs to the latter class. He is a metaphysically and religiously inclined jurist, trusting more to faith than to knowledge, more to intuition than to logical reasoning.

¹ *Op. cit.*, supra, note 29, p. 96.

² See *Boutroux*, "Historical Studies in Philosophy" (London, 1912), 262.

In order to understand his criticism of Stammler, we must see on what basis he is trying to erect his own doctrine of natural law. He says:

"It is, then, on the simple foundation of experience, interpreted by the aid of all the powers of reason, that I would affirm here the dualism, even the pluralism, so obvious in the very constitution of the universe, the theism with all its necessary consequences, the fundamental distinction between man and the other animals, the immortality of the human soul, his essential liberty, his supreme destination toward God."¹

With all my respect for Geny, I am constrained to say that it is no longer philosophy that he is offering us, but a pure and simple dogma. A dogma is not necessarily an untruth, but, in my opinion, it is utterly irrelevant to juristic philosophy.

If a man comes to Stammler for revelation, there is in store for him nothing but disappointment. He is no prophet, but a quiet scholar, a critical thinker, I had almost said a "mugwump,"² with intellectual curiosity as his dominant passion. Even his idea of justice is *professedly* a mere reflection, not a creative or dynamic force.³ It takes nothing less than a Stoic self-control and Oriental resignation to confine oneself within the bounds of knowledge.

Thus, we see that the difference between Stammler and Geny is one of temperament; and we have to side with the one or with the other according to our own temperament. When we come to speak of the "constitution of the universe," we are dangerously near to the "riddle of life," which each one of us has to solve in his own way and on the inspiration of each moment. This question may be laid on the table for the present; but if anyone

¹ Op. cit., supra, note 28, p. 356.

² *Patten*, "Development of English Thought" (New York, 1899), 390.

³ 21 Mich. L. Rev., 649. For a discussion of this view of the idealizing but impotent function of consciousness, see *Perry*, "Present Philosophical Tendencies" (1912), 346.

should desire a *philosophic* guide on this matter, then I would venture to suggest that Justice Holmes seems to have gone as far as a *philosopher* can go, when he says:

"It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives our only but our adequate significance. A grain of sand has the same, but what competent person supposes that he understands a grain of sand?"¹

We will now return to earth, and turn to something more substantial, though less ambitious.

(3) *Roscoe Pound*. — The most interesting phenomenon I have come across in the whole history of juristic thought is the identical results attained by the Stammlerian philosophy of law and by the sociological school through diametrically opposite ways of approach. This ought to excite our intellectual curiosity, and deserves careful study, for I believe that it is here that lies the possibility of a new synthesis. Let us first compare their views on various problems of jurisprudence.

a. *Criticism of the Seventeenth- and Eighteenth-century Rationalism*

(a) *Stammler*. — "The eighteenth century, as the century of Enlightenment, exaggerated this humanistic thought. It introduced the absolutely free law-giver. One would only have to discover in reason what is just, and the law-giver, it was believed, could at one stroke realize this ideal in legislation. The sentiment culminated in the French Revolution, and up to the present day the overwhelming flood has not wholly subsided. But the whole idea is *scientifically untenable*. In the genesis of the positive content of law in the perceptual way we have to do always with sensible appearances. But there are no

¹ Holmes, "Natural Law," in "Collected Legal Papers," 316.

changes in the sensible world which are not covered by the *principle of causality*. Thus, the idea of an absolutely free law-giver sets at defiance all the established *truths of modern science*. It saw the light before the *critical philosophy of Kant*, and should now be relegated to the limbo of superannuated ideas.”¹

(b) *Pound*. — “According to the Grotian definition, a right is ‘that quality in a person which makes it just or right for him either to possess certain things or do certain actions.’ The medieval idea was that law existed to maintain those powers of control over things and those powers of action which the social system had awarded or attributed to each man. The Grotian idea was that law exists to maintain and give effect to certain inherent moral qualities in every man which reason discovers for us, by virtue of which we ought to have certain powers of control over things or certain powers of action. . . .

“The seventeenth- and eighteenth-century theory, however, confused the *interest*, which exists independently of law, and the legal right, the creature of law. It confused the *interest* which the law recognizes in whole or in part and seeks to secure, with the right by which the law gives effect to the interest when recognized and to the extent of recognition. Natural rights mean simply *interests* which we think ought to be secured; *demands* which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor the state creates them. But it is fatal to all *sound thinking* to treat them as legal conceptions. For legal rights, the *devices* which law employs to secure such of these *interests* as it is *expedient* to recognize, are the work of law and in that sense the work of the state. Through the exaltation of individual *interests* which *resulted from* the theory of natural rights and the confusion of interest and legal right involved

¹ 21 Mich. L. Rev., 899–900. The italics in this and the following passages are mine.

therein, the natural rights of men presently *became* as tyrannous as the divine rights of states and rulers." ¹

b. *Criticism of the Historical School of Law.*

(a) *Stammler*. — "The 'folk-spirit' is conceived of as a special independently existing being. This corresponds undoubtedly to the orthodox *assumption* of Romanticism of a hundred years ago. It presses the significance of the individual man into the background. His convictions appear as mere operations of this composite, psychic phenomenon. . . .

"Such an account is, however, not only mystic and intrinsically obscure, but also carries with it a hopeless *contradiction*. It is contrary to the *law of causality*. For if the folk-spirit is to *produce* certain convictions in the world of experience, it must, as a limited cause, itself be in turn the *effect of other causes*. The attempt to present it as a fact of experience and still to conceive of it as a cause, which itself would not be in turn produced by *other dependent causes*, is in irreconcilable conflict with the *necessary conditions of any possible science*. . . .

"It would certainly be wrong to regard the *community life* of men merely as a summing up of individuals thought of as independent units. But on the other hand, there is no reason for making the social character of human existence itself into an actual being and contrasting this being with the sum total of individuals, as a *special living entity*, which evokes in them the now needed convictions.

"The sound kernel in the doctrine of the legal historical school lay in its emphasis on the fact that all development of law is dependent upon *historical limitations*, and that the correct meaning of a positive law may be made perfectly clear only by having recourse to its derivation. But to this end there was no need of that mystic feature,

¹ Pound, "The Spirit of the Common Law" (1921), 91-93.

derived from Romanticism, which has for a long time exerted a most depressing influence on the science and practice of law.”¹

(b) *Pound*. — “To understand the juristic creed of the historical school of the last century we must bear in mind that it was a passive restraining *mode* of thought on legal subjects by way of *reaction* from the active, creative juristic thought of the era of philosophy. Nor is this all. More immediately it was a *reaction* from two *phases* of the natural-law thinking in its last stage, namely, from the paper-constitution making and confident disregard of traditional political institutions and *conditions of time and place* which characterized the era of the French Revolution and from the belief in the power of reason to work miracles in legislation and consequent no less confident code-making of the end of the eighteenth and beginning of the nineteenth century. . . . Burke, in *reaction* from such ideas of the era of the French Revolution, was *feeling* in political science for the ideas which the historical school afterwards made *current* in jurisprudence. Fourteen years before Savigny’s memorable tract they were set forth for political history by Cuoco. Indeed it seems to have been shown that Burke’s *Reflections on the Revolution in France* had a direct *influence* upon Savigny. . . .

“After a century of historical jurisprudence along these lines we have come to think that it was not a historical school at all. It assumed legal history as an absolutely given datum. It assumed *progress* as something for which a basis could be found within itself, as *progress* of reason or of the spirit or in the unfolding of the idea. It assumed that a single *causal factor* was at work in legal history and that some one idea would suffice to give a complete *account* of all legal phenomena. It laboured under what has been called the ‘*illusion of perspective*.’ For when we look at

¹ 21 Mich. L. Rev., 651; 653–654.

the rules or the decisions or the texts of the past, through a rationalized medium of legal analysis and system, in a different *setting* from that in which they took form and were applied, we look at them for the purposes of present *problems* and with the ideas and the *setting* of the present before us. It by no means follows that what we see thus through the spectacles of the present is anything that was applied actually to the decision of causes anywhere or at any time. It is more likely to be an idealized *reflection* upon the legal problems of the present in terms of the texts of the past. Whenever we look back at law, when we look at anything beyond the actual course of judicature beneath our eyes, and for some purposes and in some relations even then, we must interpret. With the historical school the interpretation, or as Croce puts it, the history-writing, passed for history. . . .

"Yet . . . there was truth in its picture of *continuity* in that there is *continuity* in traditional *modes* of professional thought and in traditional rules of art and these modes of thought and rules of art are a powerful *restraining force* when the *materials* of a legal system are reshaping and applying to new *uses* to meet new *wants* or new forms of old *wants*." ¹

c. *Criticism of Analytical Jurisprudence*

(a) *Stammler* on Ihering's Purpose-theory of Law. — "The book, *PURPOSE IN LAW*, is built on the *premise* that law is fashioned through purpose. By 'purpose,' however, Jhering means interests and limited ends. He depicts the purposes of society and of individual self-assertion and attempts to work out a 'social mechanic.' By purposes he understands the levers that would be employed to set the will in motion. These are in part reward and compulsion, in part sense of duty and love. The

¹ *Pound*, "Interpretations of Legal History" (1923), 12-13, 19-20, 43-44.

whole, however, is operative through law as a 'political system of force.'

"In his pungent style, Jhering dwells particularly on this last thought. The passage from his work in which he clinches this point is so characteristic that it is worth quoting. Jhering conjures up his ideal of a social ruler in this fashion: 'Guided ever by his own interest, the hard-hearted, incorrigible egoist, adding experience to experience, collects for himself a store of rules of life, which are all designed to instruct him as to the right course to take in order to derive the greatest benefit from his power.' . . .

"It [Jhering's plan of a philosophy of law] was destined for failure from the very start because of the *inadequate definition* of the conception of 'purpose.' Jhering defined this as 'psychological causality.' But thereby he did not get beyond the realm of natural science. The *law of causality* signifies a *formal method* of systematizing physical changes that have occurred. In this way the present, in its certainty, is weighed in terms of what is past. With 'purpose' the attention is directed to the future. It is a matter of choosing the correct present means to attain a goal set in the future. . . .

"Law is not created by 'purpose,' but law is a particular kind of declaration of purposes." ¹

(b) *Pound* on Austin's Command-theory of Law. — "In its earliest form the idea of authority appears as belief in a divinely ordained or divinely dictated body of rules, as in Hammurabi's code, handed him by the Sun-god ready made, or the Mosaic law, or the laws of Manu, dictated to the sages by Manu's son in Manu's presence and by his direction. In its latest form it is a dogma that law is a body of commands of the sovereign power in a politically organized society, resting ultimately on whatever basis is conceived to be behind the capacity of that

¹ 21 Mich. L. Rev., 784-785.

sovereign. Such was the doctrine of the Roman jurists of the Republic with respect to the strict law. . . . This way of thinking was *congenial* to the lawyers who took the side of royal authority in sixteenth- and seventeenth-century France and through them *passed* into the doctrine of modern public law. After 1688 it was readily *adjustable* to Coke's dogma of the omnipotence of Parliament, now become a political verity, and *became* the orthodox English theory. Also when at the American Revolution and later at the French Revolution 'the people' were thought of as succeeding to the sovereignty of the British Parliament or of the French King, it was easily made *to fit* a conception of popular sovereignty. In any of these forms it puts a single ultimate unchallengeable author behind the legal order and as the source of every legal precept, whose declared will is binding simply as such. It asserts that all the rules which are *actually* applied in the administration of justice proceed from that source mediately or immediately. . . . In place of the nature-god or religious god of primitive codes it sets up a political god in the form of State or People. For in this *mode* of thinking men have their eyes upon the *need* of stability more than upon the *need* of change. Usually they deny that law changes or at least conveniently fail to see that changes are going on incessantly below the surface. From time to time they make the inevitable *readjustments* by alteration of the recorded revelation, by interpretations that leave the letter intact but give the text a wholly new meaning, by fictions often comparable to the 'let's play' this or that of children, or by a more subtle fiction of new authoritative divine pronouncements declaratory of the old. When fully conscious of change and driven to seek a fixed and absolute basis therefor, the believer in authority postulates deliberate and avowed special creation or new revelation by his political god."¹

¹ "Interpretations" (supra, note 74), 3-4.

d. *Criticism of the Materialistic Interpretation of Legal History*

(a) *Stammler*, on Marx. — "According to this tendency, the *social economy* was taken to be the 'matter' of social life. Upon the manner of production and distribution of products depends the structure and organization of a society. Law is only a 'superstructure' on the independently existing social economy. In case of essential change in the latter, the law *must* change by 'dialectic' necessity. . . .

"In the entire discussion of the materialistic interpretation of history, in which the *social economy* with production and exchange appears as *the basis* of the doctrine, there is not a single instance in which the question is definitely proposed: What then *is* really the 'social economy'? Had the representatives of the doctrine raised this question, they would inevitably have found that it is a matter of *coöperative effort*. But such is *possible* only on condition of discussion, agreement, and *systematic* regulation. If there is no legal *possibility* of entering into a contract of labor, it is idle to discuss the high or low level of wages, working conditions, tariff-making, or strikes; where a legal order makes no provision for private property or money, it is out of the question to consider high or low prices. Social production is carried out on the basis of legal bargains; the distribution of products no less so. And so the social economy, it is interesting to observe, is the *putting into execution of a determinate legal order*."¹

(b) *Pound*, on Brooks Adams. — "As Brooks Adams sees the history of the common-law writs, the king at first, when he wanted a writ for any special purpose, 'ordered one to his liking . . . and a clerk in chancery wrote it.' Presently this making of writs to order, as it

¹ 21 Mich. L. Rev., 766-767.

were, became a potential source of revenue and the barons objected because 'if justice could be sold to the highest bidder, their days were numbered.' Hence they exacted a promise from John that he would not sell justice, and later insisted that the chancellor should sell no new writs but should adhere to ancient usage. But the volume of business in the king's courts became such that the king's business could not be done with the existing writs, and parliament undertook to provide a remedy through the Statute of Westminster II. The landed gentry were too strong for the king. The judges fell 'under the influence of the great magnates of the time, as judges will,' and the statute achieved little.

"You will have *perceived* that the argument is based on Coke's and Blackstone's version of the Statute of Westminster II and the judicial interpretation thereof. Much of it must fall if that version fails. Nor does it take account of *related phenomena* which must be reckoned with in any interpretation. Down to the thirteenth century we are at most in a stage of transition to the strict law. Hence law is fluid and at times much depends upon the *wilful personality* of the king. But Henry II was by instinct a lawyer, and Glanvill's book, based on writs, shows that in the twelfth century the lawyer was at work upon them, seeking to put *system* into them and to make a strict law out of a mass of legal materials that had developed more or less haphazard. In other words, a *conscious endeavour* for something not dependent on will and resistant to class *interest* and class *influence* must be recognized. Also we must remember the medieval conception of law as an immemorial custom and that the king was bound by the law. Nor may we forget that aristocracies have always stood firmest for individual liberty because, it may be, the aristocrat, in the heyday of an aristocracy, is apt to have a vigorous personality and to think in terms of individual self-assertion. . . . The

Middle Ages thought of justice and right in fixed theological terms and conceived them as above and beyond all action of sovereigns. Such ideas coloured and gave *direction* to special *movements* that may have had economic *origins*. The ethical interpretation sees only the former; the economic interpretation sees only the latter. If we must choose, the ethical interpretation often has more for us."¹

e. *Criticism of the Free-law Movement*

(a) *Stammler*, on Magnaud and the "freie Rechtsfindung" Movement. — (This movement is characterized by the demand that there be no formulated law with absolutely binding force. All law without exception is to be flexible. In all instances decision would be made exclusively on the basis of 'good conscience,' that is, of course, according to the circumstances of the particular case.)

"This does not appear unreasonable at first glance, but will not bear *critical examination*. Many legal institutions are based on the *notion* that certain prerequisites and consequences are to be adhered to in a strictly formal way, like a bill of exchange or a check. If one should disregard these formal requirements, which in part rest upon the letter of the law, one would be destroying the very *essence* of these institutions. . . . While generally the binding character of statutory formal requirements may indeed be in many respects an inconvenience, on the other hand, it can contribute much to objective certainty in legal matters. The common legal requisites as to time cannot, as a rule, be replaced by a consideration of good conscience. Whether one is of full age or not cannot be made unqualifiedly a matter for decision according to good conscience in each particular case. One needs a binding general provision from which then one may

¹ "Interpretations," 100-102.

exceptionally allow deviations in special instances, as in the 'venia aetatis' of Roman law and the corresponding provisions in modern codes. . . .

"It would be a doctrinaire limitation without parallel absolutely to forbid the law-giver to make use of the device of fixed and binding provisions of law in order to bring about good social conditions, as the 'free law' advocates would have us do. It would weaken our legal order without bringing about any compensating good. . . .

"This view would be correct if it only went so far as to oppose the exaggerated respect for 'prevailing opinions.' . . . In many commentaries upon more recent statutes one will be told by way of explanation of a provision requiring a decision according to 'good conscience' or 'equity': What is according to 'good conscience' is determined by prevailing opinions as to good conscience. . . . What superstition and fanaticism have we not lived through in the course of history by way of 'prevailing' views. . . . Kant says most aptly of this, where he asks the question, what 'enlightenment' really is: 'Sapere aude,' 'have the courage to use your own understanding; that is the motto of enlightenment.'"¹

(b) *Pound*, on the "Revival of Personal Government." — "The *history* of law is full of suggestion as to the significance and the outcome of the present movement. For it shows that *progress* in law has taken the form of *continual* recognition of a wider *circle of interests* and *continual* securing of more *interests*. Primitive law considered but one *interest*, the social *interest* in peace and order. The strict law widened the *circle of secured interests* from the narrow field of peace and order to a broader field of general security, developed chiefly in the form of individual security against aggression and general security against arbitrary magisterial action. The stage of equity

¹ 21 Mich. L. Rev., 873 seq.

or natural law widens the *circle of recognized interests* still further by adding the social *interest* in the general morals and indirectly, through enforcing duties of good faith simply as moral duties, the social *interest* in the security of transactions. The maturity of law, while recognizing the social *interest* in the general morals, endeavors to hold fast to the social *interest* in the general security, and it widens the field of the latter by developing security of acquisitions and security of transactions as the basis of modern economic society. But this process of continual widening of the field of recognized *interests* has always put strain upon legal institutions during the periods of *transition*. And this has been true especially in periods of *growth* following periods of fixation and stability. Hence we may be well assured, when we see a reversion for a time to lawless justice, that a new stage of legal *development* is once more widening the field of *interests* recognized and secured by law. Indeed it seems reasonably clear that the significant interest for the present and for the immediate future is to be the social *interest* in the individual life, — the claim of every individual to a full moral and social life, to a human life, and the *interest* of society in recognizing and securing it. . . .

“But the remedy, if the existing law fails to secure new *interests* which clamor for recognition, is not to throw over law and set up a new dynasty of personal sovereigns. It is rather for lawyers to face the problems presented by the rise of new *interests* resolutely and intelligently.”¹

These specimens, I hope, will suffice to bring into relief the two different points of departure. I do not intend to offer any synthesis, — that task I leave to some abler hand. But it might not be uninteresting to consider for a moment what we actually learn from the above com-

¹ Pound, “Revival of Personal Government” (1920), Reprint from the “Annual Report of the Georgia Bar Association,” 21–23. See also Cardozo, “The Nature of the Judicial Process,” Lecture III.

parative survey. For one thing, Stammler is constantly referring to the law of causality and to the logical principles of identity and of contradiction. He attempts to disprove the doctrines of other schools by showing either their ignorance of causal laws or their logical fallacies. While a mere knowledge of causal laws and logical consistency may not be a sufficient basis on which to construct new doctrines, ignorance and fallacy are sufficient grounds for overthrowing the old ones.

On the other hand, we see Pound speaking in terms of "reaction," "influence," "resulted from," "became," "interests," "demands," "conditions of time and place," "related phenomena," "adjustable," "congenial," "growth," "development," "conscious endeavor." Whenever he wants to refute a theory, he will show us that it originated in a reaction against certain movements, and as these movements are no longer dangerous for us, the reaction itself must fall, since its grounds are cut from under; or that a certain theory was a result of the "illusion of perspective," and must be discarded as a natural consequence of disillusionment; or that the theory has produced or is likely to produce certain disagreeable results, such as tyranny, superstition, inactivity, obstacle to progress, or disorder.

Stammler's method *presupposes* (1) that the principles of causality, identity,¹ and contradiction are absolutely valid, (2) that it is not to our *interest* to act in ignorance of these principles. When Socrates was drinking the hemlock, he *knew* that it would cause his death, though he acted *in disregard* of it. But if he had believed that he was taking the Elixir and died in consequence of his

¹ For instance: Good conscience = good conscience,
 Good conscience \neq good conscience as determined
 by prevailing views as to good
 conscience.

We may say, *à la* Holmes, that the influence of prevailing views upon the judges is *only* a necessity, but not a duty.

ignorance, he would have cut a most ridiculous figure in history. Thus it is that knowledge is a condition to virtuous and heroic deeds. The eighteenth century, on the other hand, was mistaken in its belief that reason was the panacea, and acted *in ignorance* of the causal laws, and therefore it is not *expedient* for us to imitate its actions.

Pound's method *implies* (1) that we actually know that certain things are, for the time being at least, desirable and others undesirable; (2) that there are *objective* factors in legal evolution with which we must reckon if we are to avoid illusions; (3) that these factors are related to each other through *causal laws* or other *objective principles*.

In other words, the conclusions arrived at by each method are seen to be the starting points of the other. This is why Stammler has said: "Logic and psychology have to complement each other."¹ One could even go one step further than Stammler by allowing to psychology an equally legitimate claim to being recognized as a *fundamental* method in philosophy, instead of subordinating it under logic. For, after all, it is neither logic nor psychology, but something else, which teaches Stammler to discern the truth that "logic and psychology have to complement each other."

Pending a new synthesis, it will perhaps be enough for the adherents of each school to say: "He who is not against us is with us." Pending a new synthesis, teachers of jurisprudence will do well to read Wigmore's essay on "Nova Methodus Discendae Docendaeque Jurisprudentiae,"² which points out that law is dealt with by no less than six distinct mental activities or processes. This, however, does not mean that the several processes can be attended to at one and the same time. Let us summon William James once more to our aid: "All objects are well-

¹ 21 Mich. L. Rev., 901.

² 30 Harvard L. Rev., 812.

springs of properties, which are only little by little developed to our knowledge, and it is truly said that to know one thing thoroughly would be to know the whole universe. Mediatly or immediately, that one thing is related to everything else; and to know *all* about it, all its relations need be known. *But each relation forms one of its attributes, one angle by which some one may conceive it, and while so conceiving it may ignore the rest of it.*"¹

III. CONCLUSION

By way of concluding this essay, I find it profitable to insert the following table, which, I hope, will present Stammler's whole philosophy of law in a portable form:

	Scylla	via media	Charybdis
I. Knowledge	Scepticism Weber	Logical Realism Stammler	Dogmaticism Kohler
II. Social Philosophy	Individualism Stirner	Social Idealism Stammler	Socialism Marx
III. Legal History	Mechanism Savigny	Critical Teleology Stammler	Finalism Ihering
IV. Application of Law	Jurisprudence fixée	Justice through Law	Justice without Law

¹ "Principles of Psychology," II, 332.

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LIST OF ABBREVIATIONS

AG. = 'Ausführungsgesetz': Statute providing for the introduction of the new law.

ALR. = 'Allgemeines Landrecht': General Local Law; the laws of the Prussian State.

BGB. = 'Bürgerliches Gesetzbuch': The German Civil Code.

CPO. = 'Civilprozessordnung': The German Code of Civil Procedure.

EG. = 'Einführungsgesetz': Introductory Statute.

GO. = 'Gewerbeordnung': The Industrial Code of Germany.

GVG. = 'Gerichtsverfassungsgesetz': Judiciary Act.

HGB. = 'Handelsgesetzbuch': The Commercial Code of Germany.

KO. = 'Konkursordnung': Bankruptcy Act.

RGes. = 'Reichsgesetz': The Imperial Act Concerning Non-contentious Jurisdiction.

StGB. = 'Strafgesetzbuch': The Criminal Code of Germany.

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